

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 37

CURTIS PUBLISHING COMPANY, PETITIONER,

vs.

WALLACE BUTTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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STATEMENT BY MR. LOCKERMAN

Mr. Lockerman: Please the Court, before addressing my remarks to the jury, I want to point out to Your Honor [fol. 1280] what the legal contention is of the plaintiff in this case, that is, in part. As Your Honor knows, this being a libel action, libel is defined under the laws of this State as being a false and malicious defamation of another expressed in print or writing, tending to injure the reputation of an individual and to expose him to public hatred, contempt or ridicule.

Now, we contend that although that definition of libel includes and refers to the element of malice, that in this case there was no necessity for the plaintiff to offer evidence of actual malice on the part of the defendant for the law itself infers the existence of malice whereas in this case a libel is published, and, that therefore it is not necessary that the jury find that there was any actual malice on the part of the Curtis Publishing Company.

The Court: That is in so far as general damages is concerned but no as to punitive?

Mr. Lockerman: That's correct.

The Court: Yes, sir.

Mr. Lockerman: We point out that the article complained of contains the words "corrupt", "fixed", "rigged", and to "sell out" in referring to the plaintiff, Wallace Butts.

[fol. 1281] Now, we contend that proper definition of the word "corrupt" is that it means depraved, debased, or perverted, and we contend that the proper definition of the word "fixed" means to tamper with in advance, and that the word "rigged" means to arrange, carry out or manipulate by deceptive or fraudulent means, to fool and hoax. We contend that the words "to sell out" means to betray for compensation the cause or associates with whom one is identified, and we think that Your Honor should charge the jury along that line.

We further contend that this article, when it is read in its entirety, that the article complained of in this Saturday Evening Post charges the plaintiff with being corrupt and with rigging and fixing the 1962 Alabama-Georgia football game. We contend that that greatly injured the plaintiff in his profession as a football coach, and that the article therefore, we contend, is libelous per se, that is, that it is libelous on its face as a matter of law.

We feel that the Court should so charge the jury and to further charge the jury that the defendant in this case, Curtis Publishing Company, had the burden of proving the truth of the things it said about the plaintiff, and that if the defendant has not carried that burden and proved the truth of those things by a legal preponderance of the evidence, then the jury must return a verdict for the plaintiff in the amount of damages to which, under all the circumstances, they find that he is entitled.

We further contend that the defendant in this case has filed what is known as a plea of justification, and that under the law that by filing that plea the defendant has the legal burden of proving the words contained in the article which charged the plaintiff with being a rigger and a fixer of the 1962 Georgia-Alabama football game, and accusing him of being a participant in the greatest sports scandal since that of the Chicago White Sox in the 1919 World Series, and that it charges that he was a corrupt person who betrays or sells out his people, and he rigged and fixed the Alabama-Georgia football game as a gambling device in order to restore his financial resources. And further it charges that he was so corrupt and foul that his betrayed players were forced in the game like "rats in a maze and took a frightful physical beating", all of which is alleged in our Paragraph 11 of the petition, the plaintiff's complaint, and we contend that the jury should be charged that nothing short of the defendant proving the truth of those charges by preponderance of the evidence will suffice as a defense.

We further say that under the pleadings in this case and as the pleadings will show that Wallace Butts is asking for general damages in the sum of five million dollars. Of course, we also—the petition, as I will later on point out, shows we ask for an additional five million dollars as punitive damages, but he is asking the general damages for five million dollars to compensate him for the injury to his peace, his happiness, and his feeling as a result of the article published concerning him in the Saturday Evening Post of March the 23rd.

Now, we feel that the jury should be instructed that unless they find that the defendant has proved that this article [fol. 1283] was true, then the plaintiff would be entitled to recover general damages without proof of any amount, that it is not necessary for the plaintiff to prove that he incurred any special damages; nor is it necessary that the plaintiff prove that he has suffered any pecuniary or physical harm for the reason that the law presumes that the general damages flow from a libelous publication which injures one in his trade, occupation or business.

We contend that in a case such as this the law doesn't prescribe any measure of damages except to leave the question of damages entirely to the enlightened consciences of impartial jurors, such as the gentlemen that we have in the box, and that the jury should strive to give such damages as, in their opinion, will fairly compensate the plaintiff for the injury done. We feel that the jury should be so instructed.

In addition to asking for general damages, as I mentioned just previously; in the amount of five million dollars, the plaintiff in his petition is also seeking to recover an additional five million dollars as punitive damages under the law to deter the Curtis Publishing Company from repeating the injury to his honor, his reputation, and his integrity in the future.

We contend that under the law of Georgia, there may be aggravating circumstances in a case of this type, either in the act or in the intention of the defendant, and we con-

tend that such aggravating circumstances are present in this case. We say that the defendant has failed to prove the truth of the charges, and in addition to the amount the plaintiff is seeking as general damages that the jury should award to the plaintiff five million dollars as punitive damages to deter the defendant from repeating the injury to his honor, reputation, and integrity, and we think the jury should be so instructed.

Now, on the question of punitive damages, as on the question of general damages, we contend that the law prescribes no set way in which such damages shall be computed, that being left entirely to the enlightened consciences of these jurors.

We contend the jury should be authorized to consider in this connection the wealth of the defendant, and we further contend that the defendant has not sustained the burden of proving the statements by it about the plaintiff as being true, and that the jury is authorized to consider that fact in—authorized to consider that fact that this is an aggravating circumstance as referred to and provided for in the law in determining the amount to be awarded the plaintiff. We think that the jury should be instructed on that subject.

We point out, Your Honor, that evidence has been offered during the trial to the effect that the plaintiff, Wally Butts, through his attorney, prior to the time that the article was published, requested the defendant not to publish the article, stating to the defendant, Curtis Publishing Company, that it was not true, and that after the article was published that the plaintiff demanded a retraction by the Curtis Publishing Company of what it had said about him. Now, that is admitted in the pleadings too, the fact that the request not to publish and the request for retraction were made, and there is no question about that.

[fol. 1285] Now, under Section 105-720 of the Code of Georgia, it is relevant in an action for libel such as this for the plaintiff to prove that he had requested a retraction.

The Court: Is that 105-620 or 105-702?

Mr. Lockerman: Your Honor, it is—

The Court: That's all right; I will find it. I was just in doubt.

Mr. Lockerman: Yes, sir. Proof that he requested the retraction.

Now, we contend that the proof by the plaintiff, and, of course, the admission in the pleadings, that he demanded a retraction but the defendant failed to retract the article may be considered by the jury on the question of malice and bad faith.

We contend that the defendant has failed to prove that the article was true, and that the defendant has admitted that it refused to retract the article after being requested to do so, and we think the jury should be instructed that it is authorized to consider this fact as an aggravating circumstance in arriving at the amount of punitive damages to be awarded the plaintiff.

I want to read to the Court from the case of Cox versus Strickland, which is a libel suit action in 101 Georgia 482, decided by our Supreme Court here in the State of Georgia, [fol. 1286] where, at Page 493, beginning at Page 493, our Supreme Court has this to say:

"The right to publish through the newspaper press such matters of interest as may be properly laid before the public does not go to the extent of allowing the publication concerning a person of a false and defamatory matter, there being no other reason or justification for so doing than the mere publication of news. But false assertions, when they impute the commission of crime, are actionable; and when not based upon any facts legally tending to prove the crime imputed, the publication cannot be said to be privileged. It will not do to say that such a publication was made with reasonable care, however good the motive may have been.

"In popular belief, one man can publish of another what he sees fit, if, by bluff or otherwise, he can avoid any personal consequences on account of such act; the party aggrieved must either submit or go gunning for the publisher, or to retain his place in public estimation as a man of

honor. Generally the libeler is not in evidence; his work is done behind the scene; you cannot always know his motive. Upon the surface he is the embodiment of fairness, of patriotism, yea, sometimes his religious views almost deter him from work he is about, but, patriot as he is, he will do the public a service, and often he strikes a better man than he is, a cowardly blow though it be. Character is defined by Webster to be particular qualities impressed by nature or habit on a person, which distinguish him from others. The libeller would strip him of these. He wishes him to appear, not in his true character, but in a fictitious one, a character that he would give him. We [fol. 1287] can understand why a thief would steal, he is after gain; so forgery is committed, and other crimes; but from a moral standpoint a man who would destroy character must be ranked along with the felon who commits arson, he cannot hope to profit by it; he cannot appropriate that of which he deprived another. Character ought to be protected; the law ought to be enforced to protect it. I could not do better than quote just here from the preface to the letters of Junius: "If the characters of private men are assailed or injured, a double remedy is open to them by action and indictment; if through indolence, false shame, or indifference, they will not appeal to the laws of their country, they failed in their duty to society, and are unjust to themselves; if, from an unwarrantable distrust of the integrity of juries, they would wish to obtain justice by any mode of procedure more summary than a trial by their peers, I do not scruple to affirm, that they are in effect greater enemies to themselves than the libeller they prosecute."

SUMMATION TO JURY ON BEHALF OF PLAINTIFF

Gentlemen of the Jury, I have been actually stunned and amazed by the address that Mr. Cody just made to you. Mr. Cody is a fine man. Mr. Cody is a fine lawyer. I respect him very much. I know that in the this case that he

is being persuaded by the Curtis Publishing Company, his client in the matter, in which he necessarily must avoid discussing the real issues. The only reason that he spoke to you first in this case, being the defendant, is because the Curtis Publishing Company came in and filed a plea of what the law refers to as justification in which he claimed, in which the Curtis Publishing Company claimed [fol. 1288] that what it had said about Wally Butts was true. They, therefore, had the burden of proving that those things were true.

I don't believe that in any place in what he has said to you that he has touched in one iota on the burden that he had of proving the truth of these charges that were made as so prominently shown in that editorial in the Saturday Evening Post. He has seen fit to talk to you about anything except the truth of those charges.

Mr. Cody, apparently, Gentlemen, is taking the position that if you will just believe that Wally Butts has bad character, that the Saturday Evening Post can say anything that it wants to about Wally Butts, that it can say anything that it wants about anyone, if in some way they can come before a jury that tries the case and try to create some feeling on the part of the jury that the person that they have charged with being, say, corrupt, and with being a fixer, is of some bad character. I don't believe that you are going to let the Curtis Publishing Company, so far as the Northern District of Georgia is concerned, continue with that type of policy.

Mr. Cody told you about having been at the University of Georgia, and about how Mr. Schroder was at the University of Georgia, and Judge Morgan was at the University of Georgia. He has, of course, referred to the gentlemen that they brought here from the University of Georgia. It seems to me that the Curtis Publishing Company is trying to hide behind the skirts of the University of Georgia, that this great institution that it is. We are [fol. 1289] all proud of the University of Georgia. Mr.

Cody has no single claim to that at all. I am proud of the University of Georgia. I have a son that graduated from there in June. We all are.

Since he talked to you about the University of Georgia and when he was there, I think I likewise have a right to mention to you briefly that I probably have known Wally Butts longer than any man in this case. I was at Mercer University with Wally Butts when he played end on the football team there. He was in some respects a small man in stature, but he had more determination and more power to win than any man that I have ever seen in my life. I would not stand before you in this case today arguing in his behalf if I thought that Wally Butts would not tell you the truth when he raises his hand on this stand and swears to Almighty God that what he is going to tell you is the truth.

After the Curtis Publishing Company brought in the parties from Athens, Wally Butts went back on the stand and he still, with raised hand of telling the truth, swore to you that what he had told you in this case was the truth.

Mr. Cody has not referred to the fine young men that came over here from Athens who know Wally Butts so well. He doesn't want to mention to you, obviously, the fact that those fine young men and the coaches that came over here and testified in behalf of the truth of what Wally Butts has told you as all of us who have been in this case know that they supported the truth of what he said.

[fol.1290] Mr. Cody did not attack the character of any of those witnesses. He knew that he could not, and they have verified right to the letter everything about the heart of this case that Wally Butts has said.

Mr. Cody tried to cast doubt in your mind as to the integrity and as to the character and as to the honor of Coach Paul Bryant by suggesting that he compelled those two fine young boys who came over here to testify, that he conspired with them and rigged with them to come over here and testify.

I think Mr. Cody knows very well that the brochure that he referred to, a type of brochure of that type is put out at the end of the season and that when young boys who have graduated or rather who have completed their eligibility, outstanding young men of the team have completed their eligibility, that they are carried on the staff as helping in coaching. That brochure is prepared for next year, and I think Mr. Cody knows that, but he wants you to believe that there was a conspiracy on the part of those fine young men and Paul Bryant who come over here and tell you untruths about this case which they did not, and they verified everything to the real heart of this case that Wally Butts has told you.

Gentlemen, Mr. Cody referred, of course, to John Carmichael, and he tried to imply to you that John Carmichael had lied, had told untruths to you on the stand by claiming that John Carmichael had said that he was at the dentist's office on the morning before he went to the office where he found Burnett at his desk. Now, I don't ask you to accept my memory, but I believe if you search your own carefully [fol. 1291] you will remember that John Carmichael said that he thought he went to the dentist; he repeated it several times, "I think to the best of my recollection I was there, but I cannot be sure. It's been a long time ago." And that was what he said. And then the Curtis Publishing Company in its desperate effort in this case to try to case some question on his testimony, go out and get a doctor to come in and say, "No, we don't have any record." The man never did say that he was positively there.

And, speaking of John Carmichael, I wonder if it has occurred to you why, if his testimony wasn't true, why the Saturday Evening Post did not bring and present to you, as we did John Carmichael, this man who is referred to throughout this argument by the name of Milton Flack. Have you seen him? Now, bear in mind that he came to that office on Eleventh Street about 2:00 or 2:30 on the afternoon of the same day that Burnett allegedly made these notes, and that they sat down and discussed the

notes and discussed what was supposed to have been said. Now, if those notes weren't fraudulent, if they weren't fictitious except for the first page and the last page as testified to by John Carmichael, why didn't the Curtis Publishing Company bring that man in here? They know where he is. And I say it is not right to try to cast doubts in your minds about any such thing as that.

Pierre Howard seemed to have been furnishing a great deal of information to the Saturday Evening Post in connection with this matter. He is a local lawyer, and he is a man that the Post paid, oh, I don't know how much it was, five hundred or a thousand dollars; I think it's a thousand [fol. 1292] dollars to Pierre Howard, and they have not brought him in to testify as to the truth as to what they have assumed the burden of proof.

I think you ought to consider those things. I think you ought to give it careful consideration, and I know that you will.

Mr. Cody drew comparisons about his bald head and about whether or not—being types of inaccuracies in papers. He talks about Ricky Nelson. He talks about Dr. Kildare. He won't talk to you about the real heart of this matter, because he knows that it cannot be proven, and he has known it from the beginning, and I feel sorry for him. He had a terrific burden and he can't carry it, and he doesn't want to talk about it. He wants to talk about anything except that, and that is all he has done for two weeks, including specifically today.

Gentlemen, March the 18th, was the blackest day that could ever befall—I mean, to Wally Butts, that could ever come upon any man. That was the day that the Saturday Evening Post that bears the date of March 23 hit the press, or hit the newsstands, I mean, not the press. It had been printed up long before. On that day of March the 18th, Wally Butts became an ashamed, heartbroken form of just a shell of himself. As he told you before, he broke down on the witness stand, that he had been, after it came out, he had been ashamed to run into people or to look

them in the eye for so long, but that he had gotten to the point to where he had the strength to look any man in the eye, and that from here on out he will look them in the eye, and he swore to you that was because of the fact [fol. 1293] that what they had said about him was not true.

Wally Butts had spent thirty-five years as Head Coach, either in high schools at Monroe, starting in Monroe, going up to Male High at Louisville, and over to some other at Lexington, Kentucky, and finally coming to the University of Georgia where he had been for twenty-five years. He had reached the height of his profession. He had gotten every honor, practically, that could be gotten by a coach in the Southeastern Conference or in the United States, for that matter.

The Saturday Evening Post would have you believe that this man's character is bad. I want to read to you the fourth paragraph of the complaint, that is the petition, of course, that was filed in this case, and it alleges this in Wally Butts' petition:

"Plaintiff, during his career, has enjoyed a national reputation as a successful and respected member of the coaching profession, and has been accorded many honors, among which was his election in 1959 as resident of the Football Coaches Association, a national organization of football coaches throughout America. Upon invitation he has coached the College All-Stars, the Blue-Gray All Star game, and the North-South All-Star game. Plaintiff has, during his career, been widely sought as a speaker and lecturer on various aspects of football, and has spoken and lectured at clinics, banquets and other public gatherings throughout the United States. In addition, plaintiff has been approached and offered employment as head football coach by several colleges and professional football [fol. 1294] ball teams in the country due entirely to his reputation as successful member and leader in his profession."

And when that suit was filed the Curtis Publishing Company came into this Court and filed its answer to it, and

admitted every word of it. Now, since having done that, the Curtis Publishing Company is trying to contradict what it said in its own pleadings, in judicio, here in the courtroom.

If Wally Butts' character is bad, Gentlemen, it is because of the things said against him by this Saturday Evening Post. If people say that he is of bad character, it is because of that, and why do you think we are suing the Saturday Evening Post? We say that they have ruined him, and they did ruin Wally Butts, unless you gentlemen correct this and say what should be said to the world in this case and find, of course, that the Curtis Publishing Company has not proven the burden, has not proven the truth of its charges against Wally Butts.

I want to talk a little bit about the Curtis Publishing Company. Mr. Cody referred to Benjamin Franklin and about the two hundred thirty-six years that the Curtis Publishing Company has been publishing a magazine. Of course, it was a great magazine; it had a very conservative reputation until the new management of editors took over, Mr. Clay Blair, Jr., Mr. Davis Thomas, and the others whose depositions we read to you.

They did not bring one man here from the Curtis Publishing Company or the Saturday Evening Post to put him [fol. 1295] on the stand to testify to anything in support of what they claimed they were going to prove to you. As you know from the evidence, Clay Blair, Jr., when he took over the editorship of this, he wanted to create a different image. He wanted to get away from the image of Benjamin Franklin. He wanted to create his own image. As a matter of fact—

Where are those things, those exhibits?

—when you have those exhibits out you will find that he wanted to get so far away from the image of Benjamin Franklin, that he has taken his facsimile, this image of Benjamin Franklin, which for years and years and years was carried on the Post; he has taken it off; he doesn't want it. He tells you in his sworn testimony in this case

that he has created, he has changed the image of the Saturday Evening Post. He wants to create furor. He wants to make people mad. He wants to be sensational. He has a yardstick, a new yardstick of the image he wants to create in that magazine. He wants to make it a fireside confidential weekly publication and get into the homes of twenty-three million readers in America. He tells you that his final yardstick of the kind of image that he is creating is represented by the number of libel suits that they had at the time that he took his deposition—I forget the date—maybe sometime in May or June of this year or something like that. That is the final yardstick as he measures it, of the type of magazine that they want to publish.

Gentlemen, the Saturday Evening Post apparently has gone into the business of buying libel suits. They bought [fol:1296] this one. They paid George Burnett five thousand dollars for this libel suit, and they told him, "We will give you two thousand dollars for an affidavit. We want to try to make it appear, in effect, that we got an affidavit from you, and we will give you two thousand dollars just for an affidavit." But, in effect, they said, "If you make it good enough, Mr. Burnett, we will give you three thousand dollars more." And that is exactly what they did. They gave him three thousand dollars more. They bought themselves a libel suit. That is right in line with their policy, the image that they want to create. They want to be sensational:

In this very law suit alone that has been in every paper, every radio station, every television station for months and months and months, and recently hour on the hour, all over the world, they have gotten untold millions of dollars in publicity where the name "Saturday Evening Post" is on the ears and the lips and tongue of all the people in the world.

These reporters here, all over this courtroom are sending this out. That is what they want. You could return a verdict for Wally Butts in this case of ten million dollars, and it would be the greatest merchandising bargain

the Saturday Evening Post ever got. There is no way of telling. They could not have bought the publicity they have gotten in this case probably for fifty or seventy-five or a hundred million dollars, because it is world-wide, and you try to buy space in magazines, daily papers, radio stations, television stations all over the world where your name is mentioned every hour on the hour, such as this has been, [fol. 1297] you can't do it for any amount of money, and they have used Wally Butts for that purpose.

If you should return a verdict in this case, say, for five million dollars, they would think that they had won the greatest victory that could possibly be returned in the case.

Who do they rely on in this case? They rely on George Burnett, an eavesdropper, a man who is always one step ahead of the Sheriff, and he was caught, and he was on probation at that time. It is in the article. It shows it. Not only is he an eavesdropper, but he is a telephone conversation sneak, and that is the kind of man that they ask you to believe in preference to all of these witnesses that we have brought here in proving our case to you.

Gentlemen, there are so many things I would like to discuss with you. I have a limited time, because my fine partner Bill Schroder, is going to make the concluding argument in our behalf on Monday morning, and I want to leave him all the possible time that I can. I know he will cover it, the things that I have not mentioned to you.

I am sorry that I may have appeared to have gotten right emotional about this matter. I am emotional about it. I am mad about it. There are just thousands and thousands of people who are mad about it too, and I believe that in your deliberations and in your final verdict that you are going to return the kind of verdict that will help [fol. 1298] restore Wally Butts as he should be restored in the eyes of the world.

Thank you.

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Mr. Schroder: If it please the Court, Gentlemen of the Jury, it's a good feeling to be back where I can discuss this case directly with you again as we did when we first got into it Monday, two weeks ago.

I am going to, because the time is somewhat limited, be forced to skip over and not discuss some matters which I feel confident ought to be discussed, and perhaps you Gentlemen feel that I should discuss, but being limited as I am by the time allotted in which I am to complete the summation, I will necessarily have to skip some topics, but I do not want anyone on the jury to get the idea that because I have not touched upon them that I did not think they were important.

I want to begin by taking up where the Saturday Evening Post Lawyer ended Friday. I sat here for an hour and listened to that argument. I made voluminous notes, and there were several things which were stated in that argument which I think must be dealt with here and now.

Throughout that argument not two minutes were devoted to the merits of the case; not two minutes were devoted to the plea of justification, that is to say, that what is in that article published by the Saturday Evening Post is true. On the other hand, practically fifty-five minutes was devoted [fol. 1299] to a subject that has never arisen in this case in this courtroom until the 'eleventh hour'.

I remember the Saturday Evening Post lawyer stating to you that, in effect, Wallace Butts, because of some testimony given by O. C. Aderhold, President of the University of Georgia, Mr. Bolton, Comptroller, ought not have a recovery. Now, Gentlemen, that is not true. Gentlemen, that is not a fair statement. Part of the evidence in no way can be considered in support of their plea of justification.

Speaking of character evidence, you were told Friday by the Saturday Evening Post lawyer that if you believed Dr. Aderhold lied on the stand, then bring in a verdict for Wallace Butts. I say, again, to you, that is an unfair statement, and it is an unwarranted statement, and it does not apply in this case.

It was told you that the University of Georgia is a third party to this case. That's not so, and I personally resent it.

Mr. Lockerman argued to you immediately after the Post lawyer sat down. Here the Post was attempting to hide behind the skirts of the University. On further thought, it is not the skirts of the University that the Post would hide behind, but rather it is the coat tails of Dr. Aderhold. Mr. Aderhold was not here testifying as a representative of the University of Georgia; he was here testifying as a plain citizen Aderhold. If it ever occurred to me for a single second that he was testifying to what he did testify to as a representative of the University of Georgia, then my reaction would be, I would go home immediately, I would get my diploma and I would send it back to the University of Georgia. I would take this gold watch, which is inscribed "Presented by the faculty to William H. Schroder, First Honor Graduate, School of Law, University of Georgia, 1938", and I would send that back to them. Likewise, with this Phi Beta Kappa key won at the University of Georgia; I would send that back to them.

I would apologize to those four fine youths who came over here and testified as witnesses for the cause of Coach Butts, those fine youths who the Post lawyer would have you believe were being corrupted.

I would apologize to my daughter who is a co-ed at that institution.

No, sir, Mr. Aderhold was over here expressing his own personal views, and I will point out to you in just a moment that character evidence, good or bad, why it has no place here.

It was obvious from Dr. Aderhold's testimony that over the years he has been—he has built up an almost blinding jealousy for Coach Butts. When he became President in 1950, Coach Butts had already produced seven bowl games, and he was "Mr. Georgia"; he was getting the plaudits that Mr. Aderhold thought that he should be getting when he became President. For the next ten years they had but

one bowl game, and obviously there must have been many an argument between the two as to the budget which was being set aside for recruiting purposes.

[fol. 1301] Despite that, in 1959 Coach Butts did produce a championship team. In 1959 Coach Butts was elected the second best coach in the United States. In 1959 Coach Butts was elected President of the American Football Coaches Association, only the third time that single honor has ever been conferred upon a coach of the South, the other two, of course, being William A. Alexander, that great man from Georgia Tech, and Dan McGuggan from Vanderbilt, both of whom have long gone.

I say, why do they bring that in here at the last moment? It is because the Saturday Evening Post does not want to face up to the issues which they made by their pleadings, and what did their pleadings do insofar as this question is concerned? They have filed a paper in this court, an official paper, in which they have admitted that Coach Butts has enjoyed a national reputation as a successful and respected member of the coaching profession, that during his career he has been offered several college and professional football jobs, because of what? Due entirely to his reputation as a successful member and leader in his profession. They have admitted that.

In that article which they published, and I will show it to you in a moment when I get to that portion, they write "careers will be ruined, that's for sure." My question to the Saturday Evening Post lawyer is: How can a career be ruined if there is no career to ruin?

As the man who wrote the article, Mr. Frank Graham, Jr., we had to go to New York to find out what his story was. They wouldn't bring him down here and let him look [fol. 1302] you in the eye. And here is what Frank Graham, Jr., said in New York when his deposition was taken under oath, and this part has been read to you; therefore, it is in evidence. "In my opinion", and I am quoting, "when this article was published it was the death of Wallace Butts in his chosen profession."

Mr. Graham says again, on page 139, "both Curtis Publishing Company and I both knew that when that article was published it would ruin Coach Butts' career."

And Mr. Charles D. Thomas, the senior Editor, we had to go up there and get his testimony too, and they haven't brought him here to look you eye-to-eye and give you his story. Here is what he said up there, and it was read under oath. "I knew"—this is page 33—"that the article being published by the Saturday Evening Post was placing the professional reputation of Butts on the line." He knew it when he published it. Now, if he didn't have one, why was he so swearing?

Mr. Thomas, again, in that same deposition, page 34, "I knew before the article was published the careers of two men, including Coach Butts, would be ruined as a result of the publication." Not as a result of the testimony of Dr. Aderhold but as the result of the Saturday Evening Post article.

And they come in here Friday and they don't want to answer what their own witnesses have already testified to, and they don't want to face up to it. They want to put it in the lap of Dr. O. C. Aderhold, and, incidentally, I asked [fol. 1303] him on the stand had anyone from the Saturday Evening Post ever contacted him before writing the article, and his answer was in the negative.

Gentlemen, obviously they don't want to face up to the issue in this case, but they want to confuse and confound and befuddle the Gentlemen of the jury seated there in that box to such a degree that whatever amount you ordinarily or otherwise would give Wallace Butts would be reduced by that type of evidence.

Evasive, sidestepping the issues all the time, all the while trying to influence your thinking insofar as the amount of money that you would award Wallace Butts because of a malicious, defamatory article they published in the March 23 issue of the Saturday Evening Post.

A backfield composed of those Post officials who will not get on the stand where you can see them, Mr. Clay Blair,

Mr. Thomas, Mr. Roger Kahn, and the author, Mr. Frank Graham, would be unbeatable. They can sidestep and dodge issues better than the four horsemen of Notre Dame could ever sidestep would-be tacklers. Why don't they come in here and tell you they believe the story that they wrote?

The Saturday Evening Post lawyer was talking to you about your rights to determine the credibility of the witnesses, which is your exclusive right, and when you go to determining that you have a right to look at the witnesses on the stand to determine their personal credibility insofar [fol. 1304] as that is apparent from the stand. The Post doesn't even read the deposition of their officials. The Post doesn't even put a single one of them there where you can see them; we have had to do it.

Who is the Saturday Evening Post to start raising some questions about somebody's reputation or somebody's character? This Saturday Evening Post, who less than two years ago made a 180-degree turn from the widely respected, highly regarded Post magazine of the old, with the great Benjamin Franklin on the masthead, and they went into what they have announced as a sophisticated muckraking policy. Do they care anything about the Good Book? Are they familiar with a great verse from Chapter 8 of St. John when he was teaching the scribes and the Pharisees, and they brought a woman caught in adultery before Him, and they said, "Unto the law of Moses we are commanded to stone her." And Christ said, "Let him who is without sin among you be the first to cast the stone at her." And hearing this they went away, one by one, led by the eldest.

Does the good law "Thou shalt not bear false witnesses against thy neighbor" mean anything to the Saturday Evening Post? Does "Judge not lest ye be judged" mean anything to them?

I didn't mean to take up so much of your time on that subject, but I am telling you, Gentlemen, it's been brought in here to befuddle your thinking and to confuse you and to confound you. I think the best evidence of the type of

man that Wallace Butts is, he hasn't hidden away from this courtroom; he's been here every day, and he's been on [fol. 1305] the stand. You have had a chance to look at him, to observe him.

Seated here with him throughout for two weeks has been his lovely wife, Winnie and his three daughters. That is a glowing tribute, as glowing a tribute as were those four boys coming over here, and the trainer, Sam Richwine, and Charlie Trippi and John Gregory coming over here and showing you what they thought of Wallace Butts.

I am now going to discuss the real issue in the case, and I hereby challenge the Saturday Evening Post lawyer to also discuss the real issue in the case.

Now, he made a statement Friday in connection with this topic I am prepared to leave now. He is being directed in this case by the Post, because he wouldn't have made this statement otherwise. He made the insinuation or the innuendo that there was other evidence that he could have introduced but he didn't. That's not fair; that's not professional; that's not ethical.

The only thing, and he knows the only thing that any jury in any case can consider is the evidence that has been produced here in a legal way for their consideration. I don't know what he was talking about; I doubt if he does. But he wanted you, again, Gentlemen of the jury, to forget the real issue in the case and to reduce, as the law calls it, mitigate the dollars that you would otherwise award Wallace Butts.

[fol. 1306] They have plead what they call a plea of justification. They have done that for one purpose and one purpose only, because they know they can never sustain it. They did it so they could get the concluding argument, and that is a valuable asset to any lawyer, to be able to make the final argument to the jury, because the opposition cannot answer him then. They are through. The plea of justification of law says that what they have said of Wallace Butts in that article is true. Well, let's take a look at it.

I will just take the first couple of boards here, being the first two columns. All right, sir, this is the first line in the story.

"On Friday morning, September 14, 1962" this took place. Well, we know that is not so, and they admit it.

"'Coach Bryant is out on the field'" they say here. Coach Bryant says they had no morning practice, there would be no need to be on the field, and it was in the newspapers and Graham could have found it if he wanted to look for it.

Down here we have got, "'Hello, Bear.'" The testimony is uncontradicted that they do not refer to each other that way in the presence of each other.

These may be minor, but they are enough, in my mind, if I marked every one of those, to show that this was a very careless, irresponsible job done by the Post in its investigation and in its reporting of the article.

[fol. 1307] Now, Mr. Graham, he is the man who wrote the article, here is what he says right here. "As Burnett listened, Butts began to give Bryant detailed information about the plays and formations Georgia would use in its opening game eight days later." Mr. Graham, the man, one of the four men they would not bring down here, testified by deposition on page 51, nothing in Graham's notes which he got from Burnett indicated what was to be used or what was to be done in the football game.

Mr. Graham, again, in his deposition at page 51, "Burnett gave me no record, no information as to the details of the plays and formations." He says Burnett didn't give them to him because he didn't have his notes; he needed his notes to refresh his recollection.

That came from Mr. Graham, not from Mr. Burnett. I say that is not fair journalism; I say that is not true, careful reporting.

Going on down here again on this first column in the whole article, "occasionally Bryant asked Butts about specific offensive or defensive maneuvers." In Graham's depo-

sition he says Burnett didn't say that. He said he needed his notes to check it on, and he was going to get his notes and he was going to check it, but he never did get his notes, and he went on and published the article anyway.

Here, by George P. Burnett. He said, "Butts also said that Rakestraw (Georgia quarterback Larry Rakestraw) tipped off what he was going to do by the way he held his feet." Graham said he told Burnett that, and he put it in [fol. 1308] quotations. Of all people, Burnett says, "I never told him that." The Saturday Evening Post thought that was a mighty important item to put in that story, to induce the reader to the conclusion that this was a fixed and rigged ball game.

Mr. Kahn, the Sports Editor, and Mr. Thomas, the general Editor, both testified by deposition that that was vital information for the defensive team, Alabama, to know, that it was of the utmost importance. Now, they didn't even tell him that. He put it in there on his own.

I can go through this whole set of boards here, column by column. That is simply in illustration. You have seen the witnesses come in here who have been quoted in this article with saying things which would indicate that the article was true, come in and deny they ever made any such quotation, including a Georgia football player who still has another year to play, and without regard to what he might feel might face him when he went back to Athens, he came over here and got on this stand for his old Coach who was coaching him when he was there, and the boy is still there, Mickey Babb. They had him quoted as saying something like this: Taunting him or taunting the Georgia players by saying "You cannot run that old play on us, 'eighty-eight pop'. In effect, we know every play you have got." That was a deliberate misquotation put in that article for one purpose only, like this one about Rakestraw's feet, to lead the reader of the article to the conclusion that what these great Editors said here in the article was true.

[fol. 1309] Sam Richwine, old Sam, I had never seen him before; he is a trainer over there; he is still working there

and in the face of Dr. Aderhold and Bolton. He came over here and stood up and was counted for Wallace Butts. He says, "The quotation attributed to me in there was never made; I don't even know the plays of Georgia's team." And he is quoted as saying, in effect, that the Alabama players knew the Georgia plays during that game. He says it is one hundred percent incorrect, and, in answer to a question put to him by the Court, he says, "The only thing I knew about either team was the physical condition, and I did say, if I said anything to Mr. Bisher, I did say that the physical condition of the team in 1962 was better than it was in 1961."

And last, but not least, Coach Johnny Griffith stated that in three major instances he was misquoted by the Saturday Evening Post article. He was misquoted in one matter which was so important to the Post they made a headline word out of it, "I never had a chance." Johnny Griffith said, "I never made such a statement." They put it in there, again, for the purpose and the only purpose of inducing the reader to go along with this scurulous attack they have made on Coach Butts in this editorial in which they call him corrupt, in which they say he had fixed a game, rigged a game, threw his boys down the river, sold out his school.

These are facts upon which they claim makes that true.

Johnny Griffith again, down at the bottom, denied it. You can go over those Gentlemen. You remember—here is an- [fol. 1310] other one from Griffith here, denied; Johnny Griffith, denial there; Mickey Babb, denial here; Sam Richwine, he denied that. Yet, they file a plea of truth, a plea of justification saying that what they have said in that article and in this editorial is true, and what evidence have they brought here to support that?

They want to run around on the periphery, keeping your mind off the issue.

And who are they to judge a man's character? Mr. Aderhold? Some people don't go to night clubs, I know. Some people may think that's bad. But does that justify anyone writing an article like this? If they were relying on that,

why didn't they put it in the article? If they were relying on that, why didn't they come in here and file a paper admitting that his reputation was good?

Skipping along from the article to what was the information that they never had in their possession when they wrote the article, and that are the so-called Burnett notes. They recognized the importance of having those notes; they wanted those notes; they never got them; they wouldn't wait on them; they never really made any real effort to get them. Furman Bisher said he was never asked to get the notes for them, and he was the man on the ground here. They didn't want the notes; they didn't want to know anything that might deter from that editorial.

They came down here, Gentlemen, knowing that a man by the name of John C. Carmichael was present when the telephone call was intercepted, and Mr. Kahn testified that [fol. 1311] they knew that before Graham came here, and Mr. Graham testified that he knew that before he came here, but they did not purposely, deliberately interview Carmichael, and the reason they didn't was because they evidently came to the conclusion that he would not agree with what Burnett had to say.

That, journalism? That, fair reporting? When you are getting ready, as they say, to kill a man in his chosen profession, when you are getting ready, as they say, to ruin a man's career, they call that reporting, fair reporting, seeking the truth?

What else did they not do? They did not review the film of the game. Now, mind you, Roger Kahn, the Sports Editor, who ought to know more about sports than Mr. Thomas, who was his boss, said, "I thought it would be a good idea to review the film." Mr. Thomas testified, "Mr. Kahn thought it would be a good idea to review the film, but I overruled it; I was his boss." And you know why? Had they reviewed those films with anyone who knew anything about football, they would have known, Number one—well, we won't go all through the Burnett notes again—Number one, how the touchdowns were scored, four of which were

scored because of a man being out of position. They would have known Brigham Woodward commits fast, that not a single pass was ever thrown in his area, which an opposing coach would do if he thought that was so, or someone had told him that was so.

Had they reviewed those films, they, again, would have known that what they were getting ready to write about or [fol. 1312] what they were getting ready to write in that article was highly doubtful. Again, is that good reporting? Is that what the field or the profession of journalism owes you and owes me and owes the people of America when it is getting ready to write an article which it knows and which it states therein that it is going to ruin us, that it is going to kill us in our profession?

Taking the reputation of a man, taking a man's character and assassinating it like they have done is worse than death itself to me, because they still leave the man living with his reputation torn from him. Don't they understand that? Doesn't it mean anything to them? Can you imagine a worse day for any man to be still alive and attend the funeral of his own reputation? It is impossible to conceive of, and they were going through all of this careless reporting, irresponsible reporting, not going for the truth but something merely to lift their sagging circulation. They were libelling for profit to lift their sagging circulation so their advertising revenues would increase, would improve.

They have brought in another thing here, Gentlemen, which I assume the Saturday Post lawyer is going to discuss at some length with you, and that is the—Dr. Rose's letter. I am only going to touch on it briefly, because I really think that is all of the attention it deserves, but you will remember there was a letter written on March 6, which was after this article was put to bed and went to press, it had no influence on the Post when it wrote its article, in which he attempted to explain certain technical matters in football concerning which he had testified he knows nothing, [fol. 1313] to Dr. Aderhold, and, in good faith, because the question came up when Paul Bryant was on the stand, that

man came all the way back here from Mexico City to explain it. He says he didn't sign the letter but his secretary did. Then the Saturday Evening Post steps in with its usual defense and makes the fine educator, that Doctor of Divinity, that man who had his own church for some five or six years, sign his signature, not once, but three times on a separate piece of paper, to do what? What are you going to do with that? They don't believe him under oath? What can they get out of it? They are hurting him in the public eye. It is like asking him to take a lie detector test when he gets off the stand. But there will be some talk about that. That is the typical defense.

There will be some talk about gambling. Now, isn't that a strange thing for them to draw in this man from Chicago and make a lot of hoop-la about him, and the fact that back in 1957 he bet—him owning the Miller High Life franchise in New York and Chicago, I couldn't imagine a greater gold mine, to him betting fifty thousand dollars in '57, and the only year he ever bet that, the fact he bet that, they are trying to say there is gambling in this game because Coach Butts knew him. But he wasn't gambling in the year they are talking about now, and they know that, and there is no evidence to the contrary to that.

I assume Mr. Frank Scoby has been ruined all over again by his being kicked around by the Post in this article by a man who says, "I learned my lesson when I went down there [fol. 1314] and testified against my old bookmaker for the United States Government.

Why bring that in now? You know what they testified to when I went to New York and took their depositions, these same witnesses, Thomas, Kahn, and Graham.

Mr. Thomas, at page 83, "I had no intention of implying there was any betting by either Butts or Bryant." And Mr. Kahn, who wrote the article had this to say, under oath, "I did not imply that the game was fixed or rigged because of any betting angle."

Why bring it in unless it is to muddy the water and to keep your minds away from the issue in the case?

Frank Graham, again, who wrote the article, "I am not suggesting, when I wrote that article, or intimating that either Butts or Bryant bet on the game, either directly or indirectly." I hope they will discuss that with you and explain why they brought it in here in spite of what their own officials had to say their intention was when they published the article. Has that intention changed now? I can't change after the article is published. It is what they are thinking about and what they put in that article when they maligned and killed Wallace Butts that counts.

Coach Bryant and Dr. Rose mentioned these new rule changes, and I am not going to read them to you. I want to identify the two documents for you, why there has been so much concern to Alabama and Dr. Rose. The granning-[fol. 1315] Holt incident had a profound effect upon Dr. Rose, and he was not going to stand for it again, and his coach knew he was not going to stand for it again, and he was very much concerned about not letting it happen again, so much so that was even more important that any other phase of the athletic program to Dr. Rose. These are the new enforcement policies.

It amused me somewhat to hear my opponent stand here before you Friday and again and again and again criticize Wallace Butts, the man that they have killed, by saying that he was critical of Johnny Griffith. Johnny Griffith didn't testify to that. Johnny Griffith testified that Wallace Butts was the man that gave him his first job at the University, put him on the staff where he could finish his education, and also get paid to help do that. He testified that Coach Butts, when he got him back there as an assistant coach, after he had been over to Furman, loaned him two thousand dollars, and that Coach Butts signed his note with him at the bank, co-endorsed it, and on many occasions when the payments would become due, Coach Butts would make them. Critical of Johnny Griffith? Johnny Griffith didn't say so. Maybe it was Dr. Aderhold that said so, but he is not Johnny Griffith.

February the 26th, 1963, five days after the Saturday Evening Post has come in here and bought this libel suit, Wallace Butts wrote Johnny Griffith, "Dear Johnny, I hope you have a great year in football. You and your staff deserve the good breaks, and I hope the ball will bounce the right way for you." Again, they want to cloud the issue. [fol. 1316] They bring in something by Dr. Aderhold to the effect that there was criticism. Johnny Griffith didn't say so, and certainly that letter doesn't sound so. And Johnny still owes him money.

Before this article was published, and this is admitted to be true by the Post, when the word got around about it, I sent them a telegram not to do it because it wasn't true. I sent them a registered mail letter asking them not to do it because it wasn't true. I got an answer to neither one. They went on anyway, and Mr. Clay Blair, the head man of the Post, testified, and you heard him testify, not in person, wouldn't get up there in person, but by deposition that I took, about the call he had from Coach Butts' daughter, Jean, how she wept and she cried and implored him not to print that story because of what it would do to her Dad. No, not the Post. They went ahead. They knew what they were getting into when they did it.

As Mr. Lockerman pointed out to you Friday, that is what they wanted. They wanted a libel suit. The more libel suits they got, the better they like it. And as Exhibit No. 2 will show, this is Clay Blair, this is the man who is building the image or rebuilding or changing the image of the Post. January 15, '63, just a little less than a month before he bought this libel suit, he writes to his staff, he says here, congratulating them on the change of the image, according to like he wants the Post to be, not like Benjamin Franklin wanted it to be, "Your work has not gone unnoticed. We have many press clips commenting on the new vitality in the Post. Joe Culligan has been extremely flattering in his comments, [fol. 1317] as have the other directors of the Curtis Publishing Company." Those were the new ones they brought in and the new President they appointed when they decided to change the image of the Benjamin Franklin Post.

Now, listen to this, Gentlemen. "The final yardstick, we have about six law suits pending," and he later identified those law suits as libel suits, "meaning that we are hitting them where it hurts." Proud of his libel suits, proud of the publicity, the free advertising he gets from his libel suits.

Mr. Clay Blair, who wouldn't get on the stand and testify so you could see him, had this to say when his deposition was taken, at page 44, which we read. "I was not being facetious when I used the phrase 'sophisticated muckraking'. I meant it then and I mean it now." Their type of sophisticated muckraking is this article here where they can get a mere germ of an idea that they know will sell and will cause people to get hit where it hurts them, and result in a libel suit with a hundred million dollars worth of free advertising to them, and that is what they want. I will show you why that is what they want.

Mr. Clay Blair, again, "I changed the image of the Post." He says that the March 23 issue—that is the one with Butts' story in it—is a step in the right direction. "This issue takes us twenty-five percent toward the goal of the magazine that I envision."

Gentlemen, if that is just twenty-five percent, that type of story, toward the goal he envisions, what can we look [fol. 1318] for or hope to look for when that is multiplied four times.

He says, Mr. Clay Blair, again, "the Post advertising revenues fell from one hundred six million dollars in 1960 to eighty-six million in 1961 and to about sixty-six million in 1962. I did not like that trend dropping twenty million dollars from a one hundred six in 1960 to eighty-six in 1961 and again to sixty-two million in 1962."

That is when they changed the image. They have got to get those advertising revenues up, and I say that is the worst kind of libel that you can have. A newspaper can print a libel because someone has given it some information that turned out to be inaccurate, but when you go out and buy a libel—and they paid over nine thousand dollars for this story, which will show here in the vouchers, paid nine

thousand dollars for it—and did the reporting job that they did, they knew what they were getting; and they have it. One hundred million dollars of free advertising.

They have got twenty-three million readers. They are proud of it, that they are circulating this new image among twenty-three million readers that they sent that article to from which they have now gotten this free advertising all over the world, as Lickerman said, every hour on the hour. They don't care about Butts. They wouldn't care about you or about me. They are just one step in the direction that they are aiming.

[fol. 1319] Somebody has got to stop them. There is no law against it, and the only way that type of, as I call it, yellow journalism can be stopped is to let the Saturday Evening Post know that it is not going to get away with it today, tomorrow, or any more hereafter, and the only way that lesson can be brought home to them Gentlemen, is to hit them where it hurts them, and the only thing they know is money. They write about human beings; they kill him, his wife, his three lovely daughters. What do they care? They have got money; getting money for it.

Every man living, and woman living in the United States, I believe, who knows anything about this law suit is counting on you to keep this sort of crowd from going on under the old Saturday Evening Post name which was respectable, going on under that name with this so-called sophisticated muckraking that they are now so proudly publishing all over the country, that that is what they are engaged in.

I am looking to you for my protection. Heavens knows, if you let them out of this case for five million dollars or less, and boy, it's been worth it to them, I may be next, because they are not going to stop with that. You may be next; my wife; my children; yourself. We have got to stop them now, and you are the only twelve in the world that can stop them.

The Court: You have got ten minutes, Mr. Schroder.
[fol. 1320] Mr. Schroder: Thank you, Your Honor. Ten

minutes—twenty-five percent along the way of the magazine they envision.

Gentlemen, this is the Saturday Evening Post that we all knew, loved and respected so much before they came in with the new directors and their new president and their new muckraking. There we have got old Benjamin Franklin up there. He was on all those mastheads up until this one. He is not on this masthead. This article has been introduced in evidence without objection: "Father is a football coach". This same old Saturday Evening Post that we loved so much was proud to write a story about Wallace Butts in its true picture in 1954 with the lovely daughters there seated by him and his other daughter there, here still seated with him. He is still the same Wally Butts to them, although the Post wouldn't have anyone else believe it.

He may walk along the sidewalks scared to look people in the face, because he knows what most of them think about him now, having read what they have read about him.

He was never given a chance, never given a chance until he came into this courtroom to face his accuser, and until this day he has never been given a chance to face the Saturday Evening Post face-to-face. They wouldn't come down here and face him or face you. They have nothing but contempt for us, arrogant though they be.

[fol. 1321] I say, Gentlemen, this is the time we have got to get them. A hundred million dollars in advertising, would ten percent of that be fair to Wallace Butts for what they have done to him? Would a fifty cent assessment on each of the twenty-three million issues which they wrote about him there, would that be a strain or a burden on them? I think it would teach them that we don't have that kind of journalism down here, and we don't want it down here, and we don't want it to spread from 666 Fifth Avenue any further than that building right now.

Here's another magazine, another article, the great old Saturday Evening Post that we loved and respected,

"Georgia plays for keeps," fine article about Wallace Butts and what they thought about him then. Poor old Wally.

Those will be out with you, Gentlemen, and it will give you an idea as to the degree that the new Post has changed from the policies of the old Post, one hundred and eighty degrees.

My time is up. I have done the best I can. I have lived in agony with this man since I got the first notice that this was what was going to happen, this Post article was coming out. I have seen him deteriorating even since it came out, and I have lived in agony along with him, and it may be that the personal first-hand knowledge that I have had since almost living with him and his family every day, I may have said some things or done some things or conducted myself in some manner that was displeasing to you. All I can say, I have done my best, and if I have done any [fol. 1322] of those things, don't hold it against Wallace Butts.

You know, one of these days, like everyone else must come to, Wallace Butts is going to pass on. No one can bother him then. The Saturday Evening Post can't get at him then. And unless I miss my guess, they will put Wallace Butts in a red coffin with a black lid, and he will have a football in his hands, and his epitaph will read something like this: "Glory, Glory to old Georgia."

Thank you.

The Court: You may proceed, Mr. Cody.

CONCLUSION OF SUMMATION ON BEHALF OF DEFENDANT

Mr. Cody: Please the Court, Gentlemen of the Jury, my time too is short in which to conclude this case, and I expect to get right down to business. First, I want to reply to one comment made by Mr. Lockerman in his argument to you on Friday. I will try not to touch this subject again after I answer his statement. He said that if Wallace

Butts' character was bad, it was because of the article which the Saturday Evening Post published. If you believe that statement to be true, you ought to find a verdict against the Defendant. If he had any qualms or doubts about the truthfulness of that statement, all he had to do when these close associates and friends of Wallace Butts were on the stand was to ask them when his character became bad.

[fol. 1323] You and I both know that men such as have testified in this case would not come into this court and say that his character was bad purely because of something that was said about him in the Saturday Evening Post. They would be here defending him and I would myself, and I think those men would have been his staunchest defenders had there been any truth in that statement.

The second thing I want to mention, in order to clear the issues in this case, is a statement made by Mr. Schroder where he intimated that the Defendant in this case injected into the case the question of gambling. Nothing could be further from the actual facts. If you will read this article, and you will have it out with you, you will find that no such statement and no such intimation is made in that article charging Coach Butts or Bear Bryant with any gambling.

Here is how it got into the case, and this, too, you will have in your jury room. If you will turn to paragraph 11, subsection (c), of this law suit, this is the one that they filed and which involuntarily we came into this court to answer. They say the Plaintiff is charged in this article with rigging and fixing the Alabama-Georgia football game with Coach Bryant as a gambling device in order to restore his financial resources. If you find any such statement in this article as that which I have just read about any gambling device, well, then, too, you ought to find a verdict against the Saturday Evening Post.

When they injected the issue in this case, we had to come in and defend that charge, and that is where our

[fol. 1324] friend Scoby got into the picture and a few others. I will talk about him in a few minutes.

Now, Lockerman said I didn't talk about the Burnett notes in the argument which I made to you on Friday, and Mr. Schroder has mentioned that again today, although he has studiously avoided it himself. Not one word has been mentioned about those notes, and I want to get down to it right now, and here is what is in those notes. They mention players and they mention plays. You will have those notes out with you.

True, they are made by an amateur, and true, some of those notes are hard intelligible, but some are, and Coach Griffith and Coach Pierce and Coach Frank Inman have told you what they thought of those notes and what they meant, and those are the three ranking coaches at the University of Georgia today. They said that those notes mentioned formations, and strange enough they said of the eight or nine formations which Georgia used in the entire 1962 season, they didn't have time to train their team to use them all, but they trained that team to use two particular formations for the Alabama game inasmuch as it was the opening game of the season.

And strange to say, those two formations are mentioned in these notes. They picked that up.

I don't know too much about football, and I am going to say very little about it after I finish with these notes. [fol. 1325] In those notes there is a pass pattern that is mentioned and Griffith recognized it as one which was called by that particular name by Coach Butts. That is that optional left pass business. There is a mention made about Alabama not over-shifting on a certain play and there is mention of quick kicks, and Woodward commits himself fast. I don't know whether you will notice it or not when you get out, but these notes, when that boy Woodward's name is mentioned, it is spelled in the notes W-o-o-d-a-r-d. His name is Woodward. I don't know whether you noticed it or not, but Coach Butts pronounced his name "Woodard".

And he refers to a weak pass defense, anybody except Blackburn, and in the long count with the left half in motion, and Coach Pierce said this was one of Georgia's plays, and Porterfield referred to as a good running back, and then Babb catches everything they throw, and then he talked about something in there about avoiding a penalty on the part of Alabama.

Then we come down to this part of it. Burnett put down the time that call was completed, ten forty, and the telephone records show that the connection was made at 10:25, and the calculagraph, which is the automatic machine used by the Telephone Company, shows the call lasted fifteen minutes and some seconds.

There are some strange coincidences which confirm what is in those notes, but here are two other things I call to your attention and I am going to pass on from those notes. Bur-[fol. 1326] nett made an explanation of several parts of it. He didn't write down everything he hears, but he did remember this part of it. He picked up some evidence of bitterness against Griffith. I don't know what that is, and you don't either. We never will know, but he says with respect to a certain condition of the Georgia team, he says that is no credit to Griffith. They got two other coaches, two new coaches and then there is another part of the explanation he makes and it is this. Bryant wasn't satisfied with the information that he got, he was trying to get more, and Butts told him he didn't know, but he'd find out, and Bryant said he would call him on Sunday.

Now, you and I don't know what happened in that telephone conversation on Sunday, except that in the conversation that lasted an hour and seven minutes, and it had something to do with this particular game, and nobody will ever know what was discussed in that conversation.

We lawyers have learned to recognize and to evaluate what we call circumstantial evidence. Forget about the notes for just a moment, and let's think about the circumstantial evidence in this case.

I would like to point out to you the conduct of Burnett when this whole controversy arose, and pit it against the conduct of Wallace Butts. We might as well call a spade a spade, because after all that is the crux of this case, and I have been accused of not wanting to talk to you about it.

I saved this part of my time to discuss it with you.

[fol. 1327] In the first place, when called into a conference with a bunch of strangers, that is, the University Officials, Burnett promptly agreed that that conference could be taped and what was said be recorded. Secondly, he signed an affidavit after he was requested to do so. He promptly agreed to take a lie detector test and promptly took that test. He gave the University of Georgia Officials permission to look into his background in every respect, and a part of that was his war record, which I might say was a right enviable record, and if there was anything wrong about that record as disclosed by Burnett when he was on this stand, you can bet your life that Mr. Lockerman or Mr. Schroder would have confronted you with any error.

Now, what did Wallace Butts do? When he appeared before the same crowd on the next day, there may have been some slight difference in the personnel of those that were present, but as I recall, they were the same. I could be in error. When he appeared before those University officials, he declined to take a lie detector test. Secondly, though there is some conflict in the evidence, he declined to sign an affidavit.

Dr. Aderhold and Mr. Bolton have both testified that he declined to give them an affidavit. In addition to that, and this was after he employed counsel, he did admit—he did admit that Burnett probably heard what he said he heard, that is the language, and that is as far as they got. He resigned the next day. That, too, has some significance as far as circumstantial evidence is concerned. Later—first I should say at this particular meeting those University officials [fol. 1328] saw in those notes a reference to the fact that Bryant would call him back on Sunday. It is maybe at that time of much significance, it is now, and they tried to

find out from him if Bryant did call him on Sunday afternoon following this September 13th call, and you know what his answer was. He didn't remember the call, and he didn't remember anything that might have been said. Again, that is that call that lasted an hour and seven minutes.

And then the University officials went a little bit further. They made a check of a lot of other telephone calls, and that is where this man Scoby came into the picture, and there were two remarks made by Wallace Butts at that time that evidently riled the University officials some; after getting down to the rock bottom of this thing. He first said that he had never done anything to hurt the University. I am not going to touch on that any more, but he said this, he says, "I have never associated with anyone who was a gambler."

In the meantime, they had done a little checking themselves on this fellow Scoby, and I am going to get to that in just a moment.

And then let me point out to you something else. Schroder has questioned me or the Post as to why they didn't consult with Bear Bryant or Wallace Butts before they published this article. I will tell you way. They would have gotten the same response I got when I cross-examined Coach Butts. He didn't remember going to the office of Communications International on September 13 here in Atlanta, the point [fol. 1329] from which the call was made, the first call. He didn't remember being in Atlanta on September 13th. He didn't know where he was on September 13th. That date was important.

The record in this case shows that he had fourteen telephone conversations with Frank Scoby in Chicago in the month of September, 1962. That is the month of this particular football game, and he does not remember any one of those calls, with one exception, and that in spite of the fact, Gentlemen, that two of those calls were the day before this football game, one on the day of the game and one on the Sunday morning following the game. He did remember something about the one on the day of the game, and I should think that would impress him just a little bit more.

And he said that he called Scoby for this man Sargeant who was from Florida in Birmingham—that is where the game was being played that night—and he put Sargeant on the phone and let him talk to Scoby and that is all he had to do with it.

But the strange thing to me, and it is somewhat irreconcilable, is that all of those calls, including that one on the day of the game, were charged to the University of Georgia, which in itself was not fair and it strikes me as not being entirely honest. I don't know who this fellow Sargeant is, but if a call was made for his benefit, he should have paid for it.

My time is a little bit short, and I want to discuss with you a few miscellaneous comments that I think are important in the consideration of this case.

[fol. 1330] Up until the time that Dr. Rose came into this picture there was no positive evidence that Bryant remembered anything about either of these crucial telephone calls.

Let me read you one or two excerpts from this letter that Dr. Rose wrote Dr. Aderhold. It is a right long letter; I wouldn't read it all. In the first place, he says, "I have spent a great deal of time investigating thoroughly the questions that were raised during our meeting in Birmingham and have talked with Coach Bryant at least on two occasions." You remember that he testified that one of those occasions lasted three hours.

"As best I can ascertain, this is the information I have received. Coach Bryant asked Coach Butts to let him know what the plays were, and on September 14"—he meant 13th—"he called Coach Bryant and told him. There was a question about another one of the offensive plays of the Georgia team that would seriously penalize the Alabama team and bring on additional injury to a player. Coach Bryant asked Coach Butts to check on that play, which he did, and called back on September 16th. It was then that Coach Bryant changed his defenses and invited Mr. George Gardner, head of the officials of the Southeastern Conference, to come to

Tuscaloosa and interpret for him the legality of his defenses. This Mr. Gardner did on the following week."

He has corrected that Gardner had been there and gone. He didn't come the following week.

[fol. 1331] "The defenses were changed and Coach Bryant was grateful to Coach Butts for calling this to his attention." Now, listen to this: "Coach Bryant informed me that calling this to his attention may have favored the University of Alabama football team, but that he doubts it seriously." He is hedging on that.

It is a strange thing to me that in trying to analyze all of this conglomeration of evidence, Gentlemen, that Coach Bryant would testify in this case that he didn't remember anything about those telephone calls or the subject matter discussed, and certainly never told Dr. Rose some of the things that are in this letter. He says if he ever had a telephone conversation with Butts on September the 16th—that is that Sunday call again—they probably talked about some tickets. He wouldn't have talked to Butts about any tickets. Butts didn't have anything to do with any tickets. He hadn't been Coach down there since 1960, and all of us know that the ticket situation is handled by managers, business managers for a football team, because it is a big business.

In order to further back up Bear Bryant, one of the tragedies of this case is that Dr. Rose then backs up himself and says that he didn't sign the letter, didn't read it after it was written. I did get him to admit he dictated this letter, and that it was after his conferences with Coach Bryant. Maybe he didn't sign it, but it is his handiwork.

I will tell you this, you will have that letter out with you, together with a bunch of other letters that have been identified and put in the record in this case, including the signature [fol. 1332] on these three documents, which he signed in your presence, and I ask you to judge for yourselves whether or not those signatures are the same. It appears to me to be that way.

Now, let me talk to you a few minutes about this fellow Scoby. He didn't appear here personally. We had to go to Chicago to take his deposition, and the depositions are not entirely satisfactory. They are not as impressive as when you see a man from the witness stand. You can't listen quite as intensely. Sometimes there is an expression on a man's face or tone in his voice that says something that his words don't say, but I have jotted down a few parts of that man's deposition which was read to you. I think it was on Thursday.

That man said that he was the, as Mr. Schroder has said, the beer distributor in Chicago and New York, and up until 1958 was the distributor for a stated brand of scotch whiskey. He said he first met Wallace Butts in 1947, and had seen him quite often since then, eight or ten times a year, and had attended various athletic contests with him, that he had met Butts in Atlanta to discuss some food product, the purpose of that conference being—now, listen to this, and this is what disturbs me, it is almost beside the point and yet it is important—he said the only reason he got interested in that food product was that he wanted to find a job, find employment for some of Butts' football players. That ought to be disturbing to a University official, too, and when we asked him about that food product, he said that he admitted it was a phony—that is the expression he used—and [fol. 1333] the Food and Drug people, Food and Drug Department, that is the Federal Government, kept it off the market.

He says he met Butts several times in New York, paid his expenses after he got there. He said that Butts asked his advice as to how to finance various things, including this small loans business, and Butts asked him to invest in the small loans business and asked him to obtain capital for all three of his businesses, small loan business, the orange grove business, and this concentrated orange juice business, and he said he didn't have enough confidence in any one of them to put any money in it and he didn't hesitate long in telling Butts about it. And all of that occurred two years

ago. This is while Butts was Athletic Director at the University of Georgia.

He says he invested in the neighborhood of forty-three thousand dollars in Continental Enterprises. That is the same company that Butts and Bryant had some money tied up in and lost it. This man said he lost heavily on it himself.

I am not mentioning this subject to embarrass anybody. I am mentioning it to show you that this is more than a casual acquaintance that we are talking about. That is what they would have you believe and that is what Mr. Schroder undertook to reveal to you, but it is more than a casual acquaintance.

And he says—now, listen to this, it is on page 25 of that deposition—after Butts severed his connection as coach at Georgia, he told Butts he wanted him to take over the [for 1334] Southeastern section of the country for a new brand of Scotch whiskey and his duties would be to hire salesmen, get distributors, see that it was properly handled, supervise the personnel and be the overall representative, and that his compensation would be a drawing account and a commission, and what that would come to would depend upon his ability to produce, and he said it is still a possibility.

He said that he endorsed Butts' note at the Chicago bank and that there are still fifteen hundred dollars outstanding on that endorsement. He goes into detail as to how many times he has been with Butts, and then he gets down to this crucial part of it, and this is where he said he never bet less than five hundred dollars on a college football game, and that the maximum he would usually bet on one game would be two thousand dollars, and we asked him how many games he would bet on on one Saturday, and his answer was "About ten." You know what that means. Take it in its most favorable light, it means he could bet or did bet as much as twenty thousand dollars on one day, a total of twenty thousand dollars on ten different football games. And you wonder why we mention anything about it, after

charged in this complaint in the language which I quoted to you a few minutes ago?

He said he bet as much as fifty thousand dollars in the season of 1957. Now, the reason he admitted that, he knew we had the record on him, because he had testified in that government case, and like all other gamblers, when that record was closed, there is no other way for us to find out [fol. 1335] about any other bets, so he says he didn't make any more bets, but he has admitted to you in that deposition that he makes three or four trips a year to Las Vegas and gambles out there, and he never has undertaken to hide it from his friends and it was pretty well publicized.

And listen to this. This is on page 75 of that deposition. This is something Mr. Schroder asked him, "During September, 1962, or at any time prior to September, 1962, or at any time prior to September, have you ever had any telephone conversations with Wallace Butts which related in any manner to a forthcoming game to be participated in by the University of Georgia team?" Answer: Well, I may have said, "Well, how do you think you will do?" when he was coaching. I certainly wouldn't say that I haven't asked that question." Now, that indicates one thing to me and only one thing, and it should by inference indicate something to you, and that is that while Wallace Butts didn't have anything to do with betting on any football game himself, and which I say we never charged him with, nevertheless here was another one of his friends taking advantage of the information that he had, trying to get all the information that he had so he could win money as the result of it. That is the only reasonable inference I can draw from it.

Butts said that all he ever asked Scoby was some advice about a business deal or two, but this man didn't confirm that. He said he was asked to put money into it and actually made investigations and then turned them down. No, so [fol. 1336] much for that fellow Scoby. I wish we had him down here and could tell a little more about him.

Now, in what few minutes I have left, I want to say to you that there was one shocking thing stated by Bear Bry-

ant in this case I can't reconcile. He said that when the time came to play this football game on September the 22nd, Georgia surprised him, says that is the surprising statement in this case.

You have as an exhibit in this case the statistics of that game, and you will find, if you will look on the third page, the fact that the total yardage gained by Georgia in the first half—and you don't have to know much about football to understand this—was fourteen yards. That is the total yardage gained in the first half by running with the ball.

And then if you will turn to the last page, you will see the statistics of the game after it was over, that is, the complete game, and that the total yardage gained by Georgia during that entire game by running with the ball was thirty-seven yards. I expect it did surprise Bear Bryant to some extent. He hadn't played a game of football in years where anybody had that sort of an experience with his team. He may have been surprised, but it was for a different reason from what he said.

Even Mr. Schroder doesn't agree with Bryant on that statement. Schroder says that everybody has that play called a pro-set, and that couldn't have surprised anybody, because it is a normal formation in football, and it is one of the eight or nine formations that teams generally use that is true.

[fol. 1337] The real help that this information gave to Bryant was to know that of the eight or nine formations that were generally used by football teams, Georgia wouldn't use but two, and that gave him an opportunity to train his team by eliminating about seven other formations for which he would have to train if he hadn't had any information at all.

Now, let me talk to you just a moment about the use of this word "fix".

Judge, I have about—

The Court: You have got twenty minutes.

Mr. Cody: When you take this article out with you, you will see that the heading on it is—they have charged that.

this was a fix of one particular football game. You are not supposed to know of your own knowledge what the word "fix" means. The Court has the responsibility and duty to tell you what it means and I assume that it will fulfill that obligation.

I have looked it up, and the Court has, and the word "fix" means to tamper with in advance, and that is what this man has been charged with, and if he tampered with that game in advance, I say that it is corrupt and the use of the word in this article is correct. If he tampered with that game, it is corrupt.

And I want to explain to you or mention something which I think possibly the Court will cover in its charge to you. [fol. 1338] If you believe that this game was tampered with in advance, even with respect to plays, players, formations, or anything of that sort, which might be calculated to affect the result of the game, then the Defendant in this case has proved the truth of this alleged libel, and you would be directed I presume by the Court to find a verdict for the Defendant, if you believe that to be true.

Now, the burden is upon us to prove to your satisfaction that there was information divulged about that coming game which could be calculated to affect the result of that game, and we believe that the furnishing of that information did something that violated the standards of ethics and conduct set by the Southeastern Conference, and contrary to the moral conventions of the people with whom the Plaintiff was working.

Most of the evidence in this case about football is really immaterial. What is material is that certain information was given which tampered with that upcoming game. We do not have to show under the law what the motive was in divulging such information. We do not have to actually show it actually affected the game. The Court will instruct you about that. All we have to show is that if this information was calculated to affect that game, and if it was in fact given, then the plea of justification has been sustained,

and I think you will understand that issue when the Court completes its instruction to you.

And the case boils down to that one fact and that alone, and it is as simple as that, and if you believe that that is what was done, then you ought to find a verdict for the [fol. 1339] Defendant in this case, and I believe the Court, as I said, will so instruct you.

If the information wasn't furnished, you ought to find a verdict for the Plaintiff.

I notice something has been said in this case, Gentlemen, about the absence of witnesses. We could have strung this case out another two weeks. It has been trying to Schroder and Lockerman and me and my associates, just as it has been trying to you and this court. There has got to be an end somewhere to the trial of any case. There is always somebody you could bring into court as a witness that you don't bring, but you just go on and on. I can think of some witnesses that they might have had on this question of character. I know what I would do if somebody attacked my character. I would get my preacher and my friends and my business associates and I would bring them into court and I would ask them to testify in my behalf.

This question of the absence of witnesses is an old lawyers' trick. I remember one statement that the dean of the Atlanta Bar made one time. I am referring to Mr. Reuben Arnold, who died a few years ago. He practiced law in this town sixty-seven years, and he really was the dean of lawyers. I think everybody concedes that. He was trying to give some advice to a young lawyer one time about how to argue a case to a jury, and this young lawyer asked him a few questions about it. He said, "Well, when you go to argue a case, if the law is against you, you talk about the facts. If the facts are against you, you talk about the law." Ed, he said, "if the law and facts are against [fol. 1340] you, you talk about the lawyer on the other side."

That is an old trick of we lawyers. We criticize the other fellow sometimes unconsciously, and sometimes we go too far.

Two weeks is long enough to try any case, and if a lawyer undertakes to cut short a trial after covering the territory that he is required to cover, then he ought to be praised for it and not condemned. I brought enough witnesses into this court to try to give you a clear picture of what this case was all about. You had Dr. Aderhold, Mr. Bolton and Mr. Harold Heckman. You had Bill Bradshaw and you had Mills and you had Mr. Driftmier, Head of the Agriculture Department at Georgia. You had Griffith and Pearce and Inman, those three coaches. Their story covered a wide range and not always the same subject.

Here is what they thought, and I am going to wind up my discussion with you on this point. They thought that something was done which was wrong. They thought something was done which hurt the University, and they had the courage to come into court and to state to you just what they did think and just what they did know. It was not all a matter of opinion.

I hope that in your consideration of this case you will not put your stamp of approval on something which those men say happened, not me—I am just arguing the case—not put your stamp of approval on something which they thought was wrong and which they thought affected the [fol.1341] University of Georgia and which they thought affected that particular game.

I want to take this opportunity to say what I did in my discussion with you Friday. I thank you for the patience which you have shown in this case. I thank you for the service which you have rendered. The trial of a case before the jury is the greatest asset that we lawyers have. It is the most important function of our system of jurisprudence, and I am sure that everyone connected with this court appreciates the service that you have rendered. And with that statement I want to leave this case in your good

hands. I want you to do what you think conforms to the law as the court gives it to you in its charge, without favor or affection or sympathy toward either party.

Thank you.

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After Recess

The Court: Members of the Jury, I don't know how long the charge will be. It might be taken in two parts. If during the charge—I have attempted to correlate the charges, but during the charge, if you should desire to refresh yourselves, just hold up your hand, and we will have an intermission.

CHARGE OF THE COURT TO THE JURY

Members of the jury, this is a civil case, and the plaintiff, as you already know, is Wallace Butts, and the defendant [fol. 1342] is Curtis Publishing Company.

The plaintiff has filed a complaint setting out what he contends the facts in the case to be, and then asks for a judgment.

The defendant came into Court at the proper time and filed what is called an answer to that complaint in which it denies the material allegations in the plaintiff's petition, and contends that the plaintiff is not entitled to recover anything.

Now, the pleadings in the case are not evidence, except insofar as admissions are made in them. They are simply the contentions of the respective parties and make up the issues of fact which you are to pass upon. You may read the pleadings and refer to them as often as you wish in order that you may understand more clearly the contentions of the parties and the issues in the case. The pleadings will be out with you during your deliberations.

The Court is responsible to the jury for the law applicable to the case, and it is the jury's duty to accept the law given in charge by the Court and to apply that law to

the facts in the case. You are the sole judges of the facts, the weight of the evidence, and the credibility of the witnesses.

The Court will not express any opinion about the facts. Any such expression or intimation would not be binding on you, because you should form your own opinion and reach your own conclusion about the facts.

[fol. 1343] I want to leave absolutely to the judgment of this jury the issue that is before you as to what this evidence shows or fails to show. Your authority, however, is not to be exercised arbitrarily. It must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law which I give you.

Now, members of the jury, the plaintiff, Wallace Butts, brings this suit against the defendant, Curtis Publishing Company, for ten million dollars because of an alleged libelous publication by the defendant. In his petition the plaintiff alleges that he has been engaged in the football coaching profession for approximately 35 years, in high school and secondary schools, and from 1939 until 1961 as head coach at the University of Georgia, at which time he became Athletic Director at the University.

The plaintiff further alleges that he has enjoyed a national reputation as a successful and respected member of the coaching profession, and has been accorded many honors such as president of the Football Coaches Association, and has, by invitation, coached the College All-Stars, the Blue-Gray All-Star game, and the North-South All-Star game.

The plaintiff alleges that during his career he has been widely sought as a speaker and lecturer on various aspects of football, and has lectured at clinics, banquets, and other such public gatherings throughout the United States; that, in addition, the plaintiff has been approached and offered employment as head football coach by several professional and college football teams in the country, due entirely to [fol. 1344] his reputation as a successful member and leader in his profession.

The plaintiff further alleges that the defendant, Curtis Publishing Company, is engaged in the publication of magazines and periodicals, the best known and the most valuable asset of such periodicals and magazines being the Saturday Evening Post, which has a vast and impressive circulation.

The plaintiff contends that during the last several years the advertising revenues of the Saturday Evening Post have substantially declined, and that it now shows staggering deficits; that because of these deficits, and in an effort to bolster the sagging circulation and increase advertising revenues, the defendant did publish, through the Saturday Evening Post, willfully, maliciously and falsely, a libelous article concerning the plaintiff, in the issue of the Post of March 23, 1963, said article being entitled "The Story of a College Football Fix", with the sub-title, "How Wally Butts and Bear Bryant Rigged a Game Last Fall."

The plaintiff alleges that prior to the actual circulation of this article on or about March 18, 1963, the plaintiff, through his attorney, notified the defendant by telegram and a letter that the contents of the article were false and advised that the article not be published. A copy of the telegram and letter are attached to the pleadings and will be out with you during your deliberations.

The plaintiff further alleges that on March 18, 1963, pursuant to Georgia law, he requested the defendant to retract [fol. 1345] and correct the defamatory statements concerning the plaintiff in this article, which the defendant refused to do, and refused to reply to this request of the plaintiff. A copy of this telegram is attached to the pleadings and marked Exhibit C, and will be out with you during your deliberations.

The plaintiff contends that the publication of this article is libelous and has caused him extreme mortification and embarrassment in that the article is a direct insult and attack on his honor, character and integrity as a football coach, and contends that his career as a member of the football coaching profession has been ruined and destroyed by this article.

The plaintiff further contends that the statements and insinuations contained in the said article have damaged plaintiff as aforesaid in the following particulars:

(a) Plaintiff is charged in large block letters in the very title and sub-title of the article with being a "rigger and fixer";

(b) In an italicized editorial, plaintiff is charged with being a participant in the greatest and most shocking sports scandal since that of the Chicago White Sox in the 1919 World Series. In the same editorial the plaintiff is relegated to a status of worse than that of "disreputable gamblers," and corrupt person who, employed to "educate and guide young men", betrays or sells out his pupils;

[fol. 1346] (c) Plaintiff is charged with rigging and fixing the Alabama-Georgia football game with Coach Bryant as a gambling device in order to restore his financial resources;

(d) Plaintiff is charged with such a degree of corruptness and foulness that his betrayed players, as a result of plaintiff's alleged deceptions, fixing and rigging, were forced in the fame like "rats in a maze" and "took a frightful physical beating"; and,

(e) Defendant, in a final act of malice, contempt and editorial irresponsibility, closes its article with its definition of plaintiff as a fixer as being one who never leaves open a "chance" by stating "when a fixer works against you, that is the way he likes it."

Now, I have been reading the contentions as set out by the plaintiff in its petition.

The plaintiff brings this action and seeks to recover five million dollars in general damages, and sues for five million dollars in the nature of punitive damages to deter the defendant from repeating this trespass on his honor, reputation and integrity.

The defendant came into Court at the proper time and filed its pleadings in answer to the plaintiff's complaint. The defendant denies, in its first defense, certain insinuations and innuendoes which plaintiff alleges in his complaint resulted from publication of the article, but pleads that the statements in the article complained of, which are of and concern the plaintiff, are true. By this plea the defendant pleads justification.

[fol. 1347] Under the Georgia law, when a defendant files a plea of justification, such as was filed in this case, the defendant admits the publication of the statements contained in the article, and the whole case then proceeds upon the theory that it is admitted by the defendant that the publication is true, and the defendant takes the position that it was justified in publishing these statements.

Members of the jury, the defendant, Curtis Publishing Company, has the burden of proving by a preponderance of the evidence that the statements contained in this article are true, that is to say, that the defendant, Curtis Publishing Company, assumes the burden of proving that the statements contained in the article published in the Saturday Evening Post in its March 23, 1963 issue, which article was entitled "The Story of a College Football Fix" are true.

Now, by a preponderance of the evidence is meant that greater weight of the evidence upon the issues involved, which, while not enough wholly to free the mind from a reasonable doubt, is yet sufficient to incline a fair and impartial mind to one side of the issue rather than to the other.

Now, members of the jury, there are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts in the case. One is direct evidence, such as the testimony of an eyewitness. The other is indirect or circumstantial evidence, the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

[fol. 1348] As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply re-

quires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

The article in its entirety will be out with you in the jury room for your consideration.

I charge you that under Georgia law, a written publication which affects one injuriously in his trade or calling, such as the plaintiff Butts' coaching profession in this case under consideration, and contains imputations against his honesty and integrity, and which would, as its natural and probable consequence, occasion pecuniary loss, constitutes a cause of action and is libelous per se, and the right follows to such damages as must be presumed to proximately and necessarily result from such a publication. I charge you that Paul "Bear" Bryant, the Alabama coach and any aspersions upon him are not any issue in this case, and you would eliminate from your consideration any alleged acts on his part. Our concern is only with the plaintiff, Wallace Butts, and references to Bryant in the article may be considered only insofar as they are related to Wallace Butts. Any libel committed against Bryant, if Bryant was libeled, is not a matter for consideration here.

As stated above, this is an action brought by the plaintiff against the defendant for a libel alleged to have been committed by the defendant against the plaintiff.

[fol. 1349] A libel is a false and malicious defamation of another, expressed in print or writing, or pictures or signs tending to injure the reputation of an individual, and exposing him to public hatred, contempt or ridicule.

However, as I have told you previously, the defendant in its plea of justification, contends that the statements in the article are true. I charge you that truth is a complete defense in a civil action for libel. A libel, members of the jury, is a false defamation of another, and therefore, if what is printed is true, then there is no libel.

The truth of the charge may always be proved in justification of the libel. Truth in the law of libel means substantial truth. It is not necessary that every detail of the

article be proven to be accurate, but it is necessary that the truth be substantially portrayed in those parts of the article which libel the plaintiff.

To establish the defense of truth the defendant must prove what is known in the law as the "sting of the libel". The sting of the libel in this case is the charge that the plaintiff rigged and fixed the 1962 Georgia-Alabama game by giving Coach Bryant information which was calculated to or could have affected the outcome of the game. By this I mean, could have caused one team to win or lose, or could have increased the number of points by which the game was won.

If you find that the plaintiff did give Coach Bryant information which was calculated to or could have affected [fol. 1350] the outcome of the game by causing one team to win or lose, or by increasing the number of points by which the game was won, then you must find that the defense of truth has been established. In that event, you must, of course, return a verdict for the defendant.

The article complained of contains the words "corrupt", "fixed", "rigged", and "sell out". The word "corrupt" is defined in part to mean depraved, debased, or perverted. The word "fixed" is defined in part as meaning to arrange, carry out or manipulate by deceptive or fraudulent means, to fool or to hoax one. The word "sell out" means in part to betray for compensation the cause or associates with whom one is identified. You should keep these definitions in mind during your deliberations.

So the issue, members of the jury, for you to determine first in this case is whether or not the defendant has proved to you that the article complained of in the Saturday Evening Post is true. If the defendant, Curtis Publishing Company, has proved to you by a preponderance of the evidence that the statements contained in the article of March 23, 1963, entitled "The Story of a College Football Fix" are true, then there is no libel, and the defendant would be entitled to a verdict.

[fol. 1351] If, on the other hand, the defendant has failed to make out his plea, that is, has failed to prove to you by a preponderance of the evidence that the defamatory statements contained in the article are true, then the plaintiff would be entitled to such damages as you feel proximately and necessarily resulted from the publication. The extent of those damages depends upon the circumstances of the case, such as the malice of the defendant, the offensive character of the libel, the pain caused to the injured party, the number of publications, and the general circumstances of the libel.

Regarding the defendant's plea of justification, which is a plea that the statements are true, unless this plea of the defendant is proved to the satisfaction of you jurors, such a plea cannot and will not defeat the action; but there may be evidence under which, though insufficient to establish it, may disclose facts and circumstances in mitigation, and this may be considered by you, as jurors, to reduce in any degree that you may deem proper the amount of damages which you otherwise would have found.

Thus, a plea of justification may, according to the evidence introduced under it, have one of three effects in this action.

(1) The plea being established, the action is simply defeated;

(2) Failure to establish it, connected with failure to show any reasonable or proper cause for filing the plea of justification, may aggravate the damages; or,

[fol. 1352] (3) The partial or imperfect establishment of it or the production of evidence strongly tending to establish it may mitigate the damages.

Stated in another way, if the defendant proved the truth of the defamatory allegations, that is a complete defense, and this would be sufficient to defeat the plaintiff's claim, and you should return a verdict for the defendant. This is so because the truth is always a defense in a civil action for libel.

If at this point in your deliberations you determine that the defendant has established that the statements contained in the article are true, then you would end your deliberations here and return a verdict for the defendant, Curtis Publishing Company. If, on the other hand, you determine that the defendant has failed to prove or has only partially or imperfectly established the truth, then the plaintiff is entitled to damages, and this brings us to the question of damages and how they are to be evaluated and considered.

The plaintiff in this case sues for general and also for punitive damages. The law of Georgia recognizes both of these types of damages in a libel suit. I shall treat these separately since they are governed by different principles, and, likewise, you are to consider and pass upon them separately.

General damages are such as the law presumes to flow from any tortuous act, and may be recovered without proof of any amount. A tort or tortuous act is the unlawful violation of a private legal right, other than a mere breach [fol. 1353] of contract, express or implied.

In some torts the entire jury is to the peace, happiness and feelings of the plaintiff. In such cases no measure of damages can be prescribed except the enlightened consciences of impartial jurors. The worldly circumstances of the parties, the amount of bad faith in the transaction, and all the attendant facts should be weighed.

Under the law of Georgia, if the publication was libelous per se, and I charge you that this article was libelous per se, and the law will presume that anyone so libeled must have suffered damage. In such case, no measure of damages can be prescribed, except through the enlightened consciences of impartial jurors.

I charge you that the words "libelous per se" in this case mean words of such character that a presumption of the law arises therefrom that a party has been degraded in his business or professional reputation.

As the publication was libelous per se, I charge you that malice is to be inferred. However, the existence of malice

may be rebutted by proof of the defendant which, in all cases, shall go in mitigation of damages.

At this point, I think it is well that I should explain to you the meaning of malice under the law of defamation. Malice, in the law of defamation, may be used in two senses. First, in a special or technical sense to denote absence [fol. 1354] of lawful excuse or to indicate absence of privileged occasion. Such malice is known as implied malice or malice in law. There is no imputation of ill will to injure with implied malice. Secondly, malice involving intent of mind and heart or ill will against a person is classified as express malice or malice in fact.

I charge you that general damages are intended to compensate a party who has been libeled for the actual damages he has suffered, to make him whole, as the cases often say.

I charge you that the law presumes that the plaintiff has a good reputation, and when a defamatory statement is made against him, the law presumes he has sustained injury to that reputation and to his feelings. The law, recognizing the difficulty of proving damages, does not require a defamed person affirmatively to prove the exact amount of damages sustained by him. These are to be determined by you members of the jury in the light of all the facts and circumstances of the case,

The damages awarded must be based upon the injury to his reputation and in his occupation in the minds of those who know him or know about him. A defamed person is also entitled to be compensated for the mental anguish, pain, mortification, and humiliation he has experienced as a result of the publication.

Obviously, there is no yardstick by which you can determine these items with exactitude. In deciding this question of damages, as in all others, you must use your common [fol. 1355] sense and good judgment in determining what sum will fully compensate the plaintiff for the damages suffered. The amount awarded must bear relationship to the injury which you find he has sustained as a result of

the article. You take into account a man's general reputation, his social and business or professional standing in the community, how well-known he is, the nature of the defamatory charge and its tendency to injure such a man in the public estimation of his character, and the extent of its distribution.

When I use the phrase "a man's reputation and standing in the community", it is not limited to his reputation in the immediate area of his residence. Rather, it is his reputation in the community within which he is known. The community may be said to be co-existent with the spread and extent of his reputation.

Wallace Butts is a widely-known football personality. It is conceded that this article was distributed widely in this country and with a substantial circulation. The plaintiff is entitled to rely upon his presumption of good reputation.

I charge you that a person of bad reputation is not entitled to the same damages as a person of good or excellent reputation.

I charge you that a substantial verdict for general damages must be founded upon a finding of substantial injury. If you find that there has been no substantial injury, then the damages may be normal.

[fol. 1356] We now come to the question of punitive damages. Punitive or exemplary damages are of an entirely different nature from general or actual damages. Before you would be authorized to find punitive damages under the Georgia law, you must first determine that the plaintiff, Wallace Butts, is entitled to recover general damages. However, if you decide to award punitive damages, the sum you award need have no relationship to any amount that you may award for general damages. It may be greater or it may be less. That is a matter which rests in your sole discretion. The law of Georgia provides that in every tort there may be aggravating circumstances, either in the act or the intention, and in the event the jury may give

additional damages to deter the wrong-doer from repeating the trespass.

Where it is established that the defendant was inspired by actual malice in the publication of the defamatory matter, the jury, in its discretion, may, but is not required, to award punitive damages. As previously stated to you, actual malice encompasses the notion of ill will, spite, hatred and an intent to injure one. Malice also denotes a wanton or reckless indifference or culpable negligence with regard to the rights of others. The purpose of punitive damages is to deter the defendant from a repetition of the offense and is a warning to others not to commit a like offense. It is intended to protect the community and has an expression of ethical indignation, although the plaintiff receives the award. The plaintiff charges that the column was written and published both with actual malice and in utter and wanton disregard of his rights.

[fol. 1357] The burden of proof to establish the facts of actual malice is upon the plaintiff, Wallace Butts, and this burden he must bear by a fair preponderance of the evidence. I have previously defined to you what constitutes a preponderance of evidence.

Actual malice involves the state of one's mind, and your determination must be made from all the surrounding facts and circumstances.

Further actual malice or wanton and reckless indifference has been established must be determined from all of the evidence in the case.

Here you may consider the libel itself, the very nature of the defamatory matter in conjunction with all the other evidence and the circumstances under which the article was written and published.

A publication may be so extravagant in its denunciation and so vituperative in its character as to justify an inference of malice.

Evidence has been offered during the trial to the effect that the plaintiff, prior to the time that the article was published, requested the defendant not to publish the arti-

cle, stating that it was not true, and after the article was published plaintiff demanded a retraction.

I charge you that under Section 105-720 of the Code of Georgia of 1933, it is relevant in an action for libel such as this for the plaintiff to prove that the plaintiff requested a retraction, proof that the plaintiff did demand a retraction but that the defendant failed to retract the article [fol. 1358] may be considered by you on the question of punitive damages, if you find that the defendant has not established its plea of justification.

You may consider the reliability, the nature of the sources of the defendant's information, its acceptance or rejection of the sources, and its care in checking upon assertions.

In considering the question of malice you may also take into account the plea of justification filed by the defendant, and whether this plea of justification was filed in good faith, and under an honest expectation of being able to establish the alleged justification. You should only consider this plea of justification on the matter of damage if you find the defendant has not established it, and further find it was not filed in good faith by the defendant with any honest expectation of establishing it.

This brings the Court to another matter on the subject of malice when during the trial certain hearsay matter was admitted into evidence. Usually, of course, such hearsay matter is not admissible, but was received in this instance as evidence which might show mitigating circumstances or lack of malice.

I charge you that a defendant may resist or minimize a claim for punitive damages by showing mitigating circumstances, including the sources of its information and the grounds for its belief. A defendant may show that it acted without malice and that there was neither actual malice nor any circumstances from which malice may be inferred. In a word, a defendant is permitted to show that, in publishing [fol. 1359] this article, it in good faith relied upon certain matters which had come to its attention. And if the jury ac-

cepts this as credible, this would go in mitigation of punitive damages.

As you may recall, evidence was introduced on the trial as to the certain tests taken by a polygraph, sometimes referred to as a lie detector. Ordinarily, of course, this evidence would not be admissible in a court of law, but you may consider it only in the light of what credence or credibility the defendant used such test in determining malice, if any, on the part of the defendant.

I charge you that there were various other conversations with third persons and testimony or documents of third persons which merely reported what other persons had said or written. Of course, all of this evidence was hearsay, and there was no opportunity by the opposite party to examine such persons, some of whom were beyond the jurisdiction of the Court.

I charge you that you should dismiss from your minds completely any reference to any investigation by the Attorneys General of Georgia or Alabama, or anyone other than the parties of the charges contained in the article complained of. Neither the fact of any investigations nor the results thereof have any bearing whatsoever on the trial of this case. In arriving at your verdict you must restrict yourselves solely to a consideration of the evidence legally admitted during this trial, and the law given you in charge now by the Court.

[fol. 1360] The hearsay evidence was admitted solely for the single purpose for which it was offered by the parties, to show the absence or presence of malice as that word has been defined to you. It is not received to establish the truth of any of the statements contained in the publication, and it is in no respect to be considered for such purposes. It is for you to say whether or not such information obtained was of such nature as to justify a reasonable mind in believing and relying on them.

In deciding whether or not Curtis Publishing Company was justified in relying upon information by which it seeks to repel a charge of actual malice, you may take into ac-

count the journalistic experience of Curtis Publishing Company and its general experience.

I charge you further that a corporation acts through its agents or employees, and is liable for their acts within the scope of their employment.

It is necessary, members of the jury, that I charge you on the law of damages, but the fact that I charge you on the law of damages carries no intimation, one way or the other, that you are required to award damages for the plaintiff against the defendant.

The Court has not reviewed the evidence in detail. I have restricted myself in this charge to but a few references to the evidence. Counsel in their summations have exhaustively reviewed the evidence with respect to the various issues in the case. There has been a sharp conflict in the testimony in this case, and it is your duty to determine the truth.

[fol. 1361] Members of the jury, I charge you that the term "impeachment" is defined legally to mean efforts which tend primarily to show that the witness is narrating a falsehood or that he is not worthy of belief. The terms "impeachment" and "attack on the credibility of a witness by way of impeachment" are synonymous and means that efforts are being exerted to prove that a witness who has been examined is unworthy of credit. In other words, it calls in question the veracity of a witness.

I charge you that a witness may be discredited or impeached by contradictory evidence or by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony.

I charge you further that a witness may be impeached by evidence as to his general bad character.

If you believe that any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves. If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other

particulars. And you may reject all of the testimony of that witness or give it such credibility as you may think it deserves.

You are made by law the sole and exclusive judges to the credibility of witnesses. In passing upon their credibility the jury may consider all the facts and circumstances of the case, the witnesses' manner of testifying; their intel- [fol. 1362] gence; their interest or want of interest in the case; their bias or prejudice, if any exists; their means and opportunity of knowing the facts to which they testify; and the probability or improbability of the testimony to which they testify; and also their personal credibility insofar as the same may legitimately appear upon the trial of the case. The manner, conduct and appearance of witnesses on the stand are legitimate matters for consideration by the jury.

During the course of the trial I have passed upon the admissibility of evidence and various motions made by counsel. I wish to emphasize that you are to draw no inference from the Court's ruling with respect to the admission or reject of evidence or the sustaining or overruling of any motion. Where the Court sustains an objection excluding evidence, you are not to assume that the excluded evidence would have been unfavorable to the party who objected, and so, too, you are to draw no inferences that had it been admitted it would have been favorable to the party who offered it. These rulings related solely to matters of law.

If perchance during the trial I have made reference to testimony or in this charge have made reference to any of the testimony that does not accord with your recollection, you must reject that completely. I have no right to invade any function that you have in this case, and as you well know, your function is to decide the facts. Of course, I have made every endeavor to state the facts as I understood them, but disregard my statements completely if they do not accord with your own view.

[fol. 1363] From time to time I have occasion to ask questions of some witnesses. The judge has a right and indeed

a duty to see that the facts are clearly presented, and the purpose of the Court's questions was to clarify certain matters in the case. You are not to draw any conclusions that by reasons of my questioning the witnesses I have any point of view as to the witnesses' credibility or hold any view as to how you should decide the facts in this case. And, as I have told you before, the determination of the facts in the case are to be made by you members of the jury. You are the supreme judges of the facts and none may invade that province.

Under your oaths you are sworn to try this case in accordance with the law in evidence. You should not be actuated by motives of sympathy or prejudice. Your duty is to try the issues fairly and impartially and without fear or favor. You came into the jury box without any preconceived view, idea, or opinion, concerning the right or wrong of either of the parties, and what you know about the issues should have been learned only from the witnesses on the stand and the exhibits in this case, and your final determination of the facts must be based upon that evidence. Remember, you are not responsible for the consequences of your verdict, but you are responsible for its truth.

Now, for your convenience the Clerk has prepared a form of verdict, and I would suggest this, that when you retire to consider your verdict, you elect one of your members as Foreman. Of course, the manner in which you conduct your deliberations is entirely up to you, and I make this suggestion, that you elect one of your members [fol. 1364] as Foreman so that the Foreman may preside over the meeting so that you may conduct an orderly discussion and arrive at a unanimous verdict.

The form of verdict which has been prepared has four questions or issues which you are to determine. The first question concerns the issue of liability, and this, members

of the jury, is the first question or issue which you have to decide. As I have previously stated to you, if you find that the defendant has proved to you its plea of justification in accordance with the rules of law heretofore stated to you by the Court, then it would be your duty to return a verdict for the defendant as to liability. If, on the other hand, the defendant has not carried its burden by proving its plea of justification, then it will be your duty to return a verdict for the plaintiff.

So, on this first question or issue which you are to determine, the form of verdict which has been prepared for you provides as follows: "We, the jury, find in favor of blank". And you will fill in this blank either "Wallace Butts" or "Curtis Publishing Company".

If your answer to the first question on the issue of liability is in favor of Curtis Publishing Company, then you need not consider Questions 2, 3, or 4.

Second, if your answer to Question No. 1 is "Wallace Butts", then you would go further and say "We assess general damages for Wallace Butts in the sum of blank dollars."

[fol. 1365] Third, if your answer to Question No. 1 is "Wallace Butts", and you have found in Question No. 2 an amount, then you would be entitled to go further and say "We find that Wallace Butts is, or is not, entitled to recover punitive damages from Curtis Publishing Company."

And fourth, if your answer to Question No. 1 is in favor of Wallace Butts, and your answer to Question No. 2 is a certain amount, and your answer to Question No. 3 is that he, Coach Butts, is entitled to recover punitive damages, then your verdict would go further and say, "We assess punitive damages in the sum of blank dollars."

I charge you that you cannot award punitive damages without assessing general damages in some amount.

After you have arrived at a verdict, the Foreman should sign that verdict form and date it.

After you have retired to consider your verdict, if there are any matters upon which you desire further instruction or any clarification of instructions, do not hesitate to let the Marshal know of your request in that respect, and you will be brought back into the courtroom for that purpose. You will retire to the jury room to await further instructions.

The Court: All right, sir. Any exceptions on behalf of the Defendant to the charge?

[fol. 1366]

DEFENDANT'S EXCEPTIONS TO THE COURT'S CHARGE
TO THE JURY

Mr. Cody: May it please the Court, the first one is with reference to the Court's charge about the article being libelous per se. We want to protest the record. We have discussed it at pre-trial, and we have called the Court's attention to the Weatherford case, it being our position that the Plaintiff in this case, at the time of this publication, was not in that profession, and, secondly—

The Court: I charged that—I charged that it was libelous per se on the basis of the Winestrof—Dun & Company versus Winestrof.

Mr. Cody: I think I understand the Court's view about it.

The Court: Yes, sir.

Mr. Cody: At one point in the charge you stated to the jury that they take their evidence from the witness stand. Technically, I think that is—

The Court: I said "witness stand and exhibits", I believe.

Mr. Cody: And exhibits, and you eliminated the word "deposition".

The Court: I believe during the trial of the case I in-
[fol. 1367] structed them in regard to the depositions, they would be considered as if the witness had been here.

Mr. Cody: If so, that would cover it.

The Court: I believe that is true. I believe I did it on two different occasions.

Mr. Cody: I wouldn't want any instruction to encompass a disregard of depositions, because the defendant's case, in part, is by evidence produced by depositions.

The Court: I believe I charged the jury on depositions twice. I instructed them twice when depositions were read.

Mr. Cody: I see.

The Court: All right, sir, any further exceptions?

Mr. Cody: And then with reference to requests which have heretofore been made to the Court in writing, we take exception to the absence of the charge to include request No. 3, which deals with what credit should be given to an impeached witness, and we take the position that his testimony shall be disregarded entirely if he has been successfully impeached.

[fol. 1368] The Court: If the jury so sees fit.

Mr. Cody: Yes, sir; unless corroborated by circumstances or other unimpeached evidence.

The Court: I believe I gave them that, Mr. Cody.

Mr. Cody: I see. And then there are one or two Code sections concerning which written request was made. I call attention to the defendant's request No. 5 which has to do with a person testifying in his own behalf is not entitled to a finding in his favor, if that version of the testimony most unfavorable to him shows that the verdict should be against him.

And request No. 6, whenever a party presents himself as a witness and the evidence is contradictory or equivocal, his testimony must be construed most strongly against him.

The Court: Well, No. 5, I didn't think it was applicable to this case, and No. 6, I believe I gave in different wording. I don't always follow the words that the attorneys set up in the pleading—set up in the request to charge.

Mr. Cody: I have some question, Your Honor, about that reference in the charge to the worldly circumstances

[fol. 1369] of the parties. We think that that should be considered only under Code section 105-2003.

The Court: What do you mean? You don't think that relevant to the worldly circumstances of the party?

Mr. Cody: Well, not—does Your Honor have Section 105-2003?

The Court: No, sir; but I am familiar with that. The reason I gave that, there were some cases in Georgia to the effect, or I read some cases to the effect that the worldly circumstances and the wealth of the parties should be taken into consideration, and that was the reason, that a party—a hundred dollars punitive damages against one party would be more severe than maybe ten thousand dollars against another party—

Mr. Cody: Yes, sir.

The Court: —because it is according to the wealth and worldly circumstances. We are talking about punitive damages—

Mr. Cody: Yes, sir.

The Court: —and that was the reason I gave it.

[fol. 1370] Mr. Cody: I got the impression it was not limited to punitive damages, it had only—but I was afraid that the language that the Court used might be broad enough to encompass other types of damages.

The Court: I meant it to apply only to punitive damages, and I think it was under the punitive damages section which I charged. Do you remember what I made it in connection with, Mr. Cody?

Mr. Cody: No, sir; I don't.

The Court: Do the attorneys for the plaintiff—it was my recollection I was discussing punitive damages. Do you know where it is?

Mr. Cody: Your Honor, I withdraw our exception to that last.

The Court: That disturbs me. I think I meant it as punitive. If I didn't—

Mr. Cody: I will withdraw our exception.

The Court: You withdraw your exception? I meant to refer to it, and I can't find it. All right, sir, any other exceptions?

[fol. 1371] Mr. Cody: No, sir.

Let the jury be brought in.

(Whereupon the jury returned to the courtroom at 10:31 a. m.)

The Court: Mr. Foreman, have you arrived at a verdict, sir?

The Foreman: We have, Your Honor.

The Court: Present the verdict to the Marshal.

Let the Clerk publish the verdict.

VERDICT

The Clerk: Will you stand, please.

"Wallace Butts versus Curtis Publishing Company; verdict: (1) We, the jury, find in favor of Wallace Butts.

"(2) We assess general damages for Wallace Butts in the sum of sixty thousand dollars.

"(3) We find that Wallace Butts is entitled to recover punitive damages from Curtis Publishing Company.

"(4) We assess punitive damages in the sum of three million dollars.

"This the 20th day of August, 1963; Joe B. Dekle, Foreman."

[fol. 1372]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS ON DECEMBER
10, 1963, IN REGARD TO DEFENDANT'S MOTIONS FOR NEW
TRIAL AND JUDGMENT NOTWITHSTANDING THE VERDICT

The Court: And if that be true, and I am looking at it from a practical standpoint, I think you have to, without committing the court in any way—I am just throwing this out, why wouldn't the proper thing—you have alleged to twenty-five or thirty different errors. If the court granted a motion for a new trial because it was excessive, the question of whether the court committed error in those thirty-five or thirty-seven different ways as to the charge, as to the admission of argument, if it was improper, why wouldn't it be proper to let it all go to the Court of Appeals at one time, and then at that time if they say it has got to be retried, the verdict is excessive, perhaps they might pass on these thirty-five or thirty-seven different alleged errors, and if it was error, then on a new trial the court could correct those errors.

Mr. Cody: Well, if Your Honor thinks that errors have not been committed such as those—

The Court: I am not saying they have or have not. You are alleging them.

Mr. Cody: That's right.

The Court: If they have been committed they should be corrected.

A two-weeks-and-three-day trial is cumbersome and expensive for all the parties, for the court as well and for the Government.

[fol. 1373] Mr. Cody: Well, I think Your Honor is losing sight of the fact of many a case has been tried without any error whatsoever and yet an excessive verdict resulted, nobody knows why, and yet it is the duty and responsibility of that court to correct it.

The Court: All right, sir. Suppose it is excessive; let's assume that it is excessive—

Mr. Cody: Yes, sir.

The Court: —and the court grants a new trial, and then we try it again, and the court charges the jury as it did before, and the argument of counsel comes in as it was before, or substantially so, then we still haven't decided whether his argument is improper or the court's charge is improper. That is what I am looking at, looking at it from a practical standpoint, with the idea of expediting it.

.

The Court: All right, sir. Suppose the court should determine that probably a certain portion of the argument was improper, and therefore the verdict was excessive, and grant you a new trial on that ground, and then it was tried again, and the same charge was given to the jury, and then the verdict was, maybe, not quite as excessive, but you came back and made a motion for new trial after a substantial verdict was rendered, the court, on the [fol. 1374] question of the court improperly charging the jury, we would have to go back again.

.

Mr. Lockerman: The testimony that they are now complaining about as having not been admitted was, as they stated, ruled out on the ground it was hearsay. They, at no time, made any statement to the court as to the purpose for which the testimony was being offered or what it was expected to prove. Your Honor's ruling was eminently correct as the matter stood when that testimony was sought to be put in.

Now, if they had taken the position then that they are taking now, and if they had explained to Your Honor the purpose for which it was being offered, then undoubtedly Your Honor's ruling would have been possibly different, or could have been, anyway.

I don't think we need to deal with that very long, because in the case of Maryland Casualty Company v. Simmons, 2 F. 2d, 29, which is the Fifth Circuit Court decision from this court, from Georgia—I think it is this court—

anyway, it is from the State of Georgia, in which certiorari was denied by the Supreme Court of the United States in 45 S. Ct. 226, 255 U. S. 634. The Fifth Circuit held as follows:

"Exclusion of evidence not ground for reversal in absence of showing as to its nature or statement of what it intended to prove."

[fol. 1375] Now, certainly in this case there was introduced into evidence the record of the telephone company which showed that a telephone call was made at the date and hour claimed and the telephone number to which it had been, you know, made, so there was proof to substantiate Burnett that a telephone call was made.

Now, they made no point, as I said, about the reason for trying to claim that they should be permitted to show what the telephone operator said over in Alabama. Mr. Cody did recognize that it was hearsay, and, as a matter of fact, before Your Honor ruled on the matter, on the objection, Mr. Cody himself—and the record shows he stated to the witness, "No, don't go into that." He recognized as the matter stood then it was hearsay, and there was no—

The Court: Yes, sir; I am frank to say, had I known what was developing, I think the evidence could have been admitted or should have been admitted.

.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT No. 6

TO: POST STAFF
FROM: Clay D. Blair, Jr.

January 15, 1963

If I—or you—had time, I'd like to congratulate each of you personally. In lieu of this, let me say in this broadcast that you are putting out one hell of a fine magazine. The articles are timely, full of significance and exclusivity. The cover, the layout, type and other visual aspects have improved tremendously. The cartoons are the best being published. The new fiction program bids fair to become one of the great breakthroughs in magazine publishing.

Your work has not gone unnoticed. We have many press clips commenting on the new vitality in the Post. Joe Culligan has been extremely flattering in his comments, as have the other directors of the Curtis Publishing Company. The final yardstick: we have about six lawsuits pending, meaning that we are hitting them where it hurts, with solid, meaningful journalism.

I think you should be very proud of the publication you're turning out.

Double space between each payment. The amount of each check should be shown opposite the payee's name. Do not show Account to be charged for each check. Charges should be summarized.

The embossed total must agree with the total amount shown in each column and be shown directly below the typewritten totals. The requisition must be signed and approved directly below the embossed total. Submit original to Accounting.

**THE CURTIS PUBLISHING COMPANY
CHECK REQUISITION**

DUPLICATE ORIGINALATOR'S COPY

Summary by Charge	
Account	Amount

UNITED STATES DISTRICT COURT
PLAINTIFF'S EXHIBIT No. 8

21491

Milton R. Flick ✓
c/o Pierre Howard, Esq. 1324 Healey Bldg.
Atlanta Georgia (SS# will follow)
Research fee & guarantee of exclusivity on:
SECRET SPORTS STORY- Article

✓ 500 00

[fol. 1377]

1041

B

✓

Date Paid

Bank

First Check No.

100

CS-11
4259

Double space between each payment. The amount of each check should be shown opposite the payee's name. Do not show Account to be charged for each check. Charges should be summarized.

IN UNITED STATES DISTRICT COURT
PLAINTIFF'S EXHIBIT No. 9

The embossed total must agree with the amount shown in each column and be shown directly below the typewritten totals. The requisition must be signed and approved directly below the embossed total. Submit original Accounting.

THE CURTIS PUBLISHING COMPANY
CHECK REQUISITION

DUPLICATE ORIGINAL COPY

✓
Frank Graham, Jr.
201 Congress St. NEWY 1, NY
111-22-5737

Article: A STORY OF A COLLEGE FOOTBALL FLY

Amount of Check	Summary by Charge	
	Account	Amount
✓ 2,000 00		

1042
[fol. 1378]

2149T

Double space between each payment. The amount of each check should be shown opposite the payee's name. Do not show Account to be charged for each check. Charges should be summarized.

The embossed total must agree with the total amount shown in each column and be shown directly below the typewritten totals. The requisition must be signed and approved directly below the embossed total. Submit original to Accounting.

THE CURTIS PUBLISHING COMPANY CHECK REQUISITION

21491
PUBLICATIONS
CLINTON, 1963 - COPY

Amount of Check	Summary by Charge	
	Account	Amount

IN UNITED STATES DISTRICT COURT
PLAINTIFF'S EXHIBIT No. 10

Furman Bisher ✓
The Atlanta Journal, Box 4689 Atlanta 2, Ga.
244-14-7956
Work on Article: THE STORY OF A COLLEGE
FOOTBALL FID by Frank Graham, Jr.

✓ 1,000 00

STAMP
DATE OF DEBIT

[fol. 1379]

D.

Date Paid

Bank

First Check No.

147

1043

**THE CURTIS PUBLISHING COMPANY
CHECK REQUISITION**

Pay To Western Union

Address _____

2149
Date **3/16/63**

PLAINTIFF'S EXHIBITS NOS. 11 AND 12

TRIPPLICATE - ORIGINATOR'S COPY

**To wire money to Pierre Howard
1324 Healey Building
Atlanta 3, Georgia**

**in further connection with "Secret Sport Story"
(George Burnett and Frank Graham)**

**EXPS. ACCT'D. FOR TO D. SCHANCHE - IN CONNECTION
WITH "SECRET"**

Account Number	Amount
09-211-49	\$500.00 ✓ X

Embossed Total _____

Signed _____

FOR ACCOUNTING USE ONLY

Check Date _____

Check No. **910**

Approved _____

Bank _____

Do not approve until total is embossed

**THE CURTIS PUBLISHING COMPANY
CHECK REQUISITION**

Pay To Western Union

Address _____

2149
Date **3/16/63**

[fol. 1380]

TRIPPLICATE - ORIGINATOR'S COPY

**To wire first payment for rights to exclusive
"secret" sports article (G. Burnett with Frank
Graham), to:**

✓ **Pierre Howard, attys (receiving money
1324 Healey Building in behalf of
Atlanta, Georgia Burnett)**

Account Number	Amount
09-211-49	\$2,000.00 ✓

Embossed Total _____

Signed _____

FOR ACCOUNTING USE ONLY

Check Date **3/25/63**Check No. **930**

Approved _____

Bank _____

Do not approve until total is embossed

GS235
4394

THE CURTIS PUBLISHING COMPANY
CHECK REQUISITION

21491

Pay To Pierre Houder ✓

Date 3/19/63

Address 1324 Fenley Bldg., Atlanta 3, Ga.

TRIPLICATE - ORIGINATOR'S COPY

Account
Number

Amount

Additional payment for Sports article by
Frank Graham, Jr., in accordance with contract
of 2/26/63

09-211-49

✓ \$3,000. 00
✓

(in behalf of George Burnett) ✓

(No Social Security # available at this time)

Embossed Total

Signed

FOR ACCOUNTING USE ONLY

Check Date

Check No.

Approved

Bank

Do not approve until total is embossed

Double space between each payment. The amount of each check should be shown opposite the payee's name. Do not show Account to be charged for each check. Charges should be summarized.

The embossed total must agree with the total amount shown in each column and be shown directly below the typewritten totals. The requisition must be signed and approved directly below the embossed total. Submit original to Accounting.

THE CURTIS PUBLISHING COMPANY CHECK REQUISITION

DUPLICATE ORIGINAL COPY

IN UNITED STATES DISTRICT COURT
PLAINTIFF'S EXHIBITS NOS. 14 AND 15

Summary by Charge	
Account	Amount

2749T

Frank Graham, Jr.
201 Congress St Bklyn 1, NY - 114-22-5737
Exp into on Article: STORY OF A FOOTBALL
FIX.....\$512.09

21491

INSTRUCTIONS: Use this form in place of a purchase requisition when bill has been received prior to issuance of a purchase requisition. Prepare form in quadruplicate. Give a complete description of each item. Retain third copy. Forward first, second, and fourth copies to Supply Division. Use bill Received Order Number when requesting information.

ORDER NO.
68540

VENDOR

Fugazy Travel Bureau
488 Madison Avenue
New York 22, New York

QUANTITY	DESCRIPTION	UNIT PRICE	TOTAL VALUE
2/18	M38091 John Skow ✓ Idl/Lisbon/Santa Maria/ Lisbon/Madrid/Seville/Madrid/London/Glasgow/ London/Idl. 2/18 - (U.S.Foreign Bases assignment)		583 40
2/20	M38650 Graham, F. - Idl/Atlanta 2/20		38 59

AUTHORIZED AMOUNT ON SIG.

CHARGE NO.	AMOUNT	DIVISION	REQUESTED BY	DATE
09-211-49	621.99		Post Editorial	3/15/63
			APPROVED BY	DATE
			G. Muller	3/15/63

F.O.B.

1 BILL 2 CREDIT

CREDITOR'S NO.

NET AMOUNT

DISCOUNT

% DISCOUNT

BY

DATE TO ACC.

INV. DATE

[fol. 1383]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT No. 16

SOUTHEASTERN CONFERENCE

REDMONT HOTEL

BIRMINGHAM, ALABAMA

FA 2-6173

PRESIDENT

J. WAYNE REITZ

UNIVERSITY OF FLORIDA

GAINESVILLE, FLA.

COMMISSIONER

BERNIE MOORE

SECRETARY

T. A. BICKERSTAFF

UNIVERSITY OF MISSISSIPPI

UNIVERSITY, MISS.

MEMORANDUM

TO: SEC Institutions

SUBJECT: Unnecessary Roughness in College Football

I wish to direct your attention to a memorandum that was sent to all Head Football Coaches by William D. Murray, President of the American Football Coaches Association, and H. O. (Fritz) Crisler, Chairman, NCAA Football Rules Committee (copy enclosed).

At a joint meeting of the Conference Football Coaches and game officials on August 4, 1962, Mr. George Gardner read and discussed this memorandum. Also, stressed the compliance with NCAA Football Rule 9, Sections 1 and 2, Article 1:

Section 1. Disqualifying Fouls

"No player shall strike an opponent with his fist, or deliver a blow with extended forearm, elbow, or locked hands, or kick or knee an opponent during the game or between the periods."

PENALTY—15 yards. Offenders shall be disqualified.

Section 2. Personal Fouls

"e. There shall be no piling on, falling on, or throwing the body on an opponent; after the ball becomes dead."

PENALTY—15 yards. Flagrant offenders shall be disqualified.

It is the policy of the Southeastern Conference to follow a strict enforcement program in all of the above areas, as stated in paragraph 7, page 39, of the SEC Constitution and By-laws, and the officials were so instructed.

At a separate meeting with the Head Football Coaches, or their representatives, on August 4, we asked for their cooperation in an all-out effort to eliminate unnecessary roughness in the game of football.

[fol. 1385] I sincerely hope that the entire coaching staff at each member institution will conscientiously cooperate in such a program.

Bernie Moore
Commissioner

enc.

Aug. 27, 1962

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT No. 17

TO: INTERCOLLEGIATE FOOTBALL
COACHES, COMMISSIONERS AND
OFFICIALS

FROM: THE PRESIDENT OF THE FOOTBALL
COACHES ASSOCIATION AND THE
CHAIRMAN OF THE FOOTBALL RULES
COMMITTEE

Re: Unwarranted viciousness and brutality in our college game

In recent years there has been a growing concern about the malicious brutality which appears to be on the increase in our great game of intercollegiate football. At its January meeting the Rules Committee received with alarm reports from many districts of uncalled for viciousness, particularly in the area of striking or delivering a blow with the hand or forearm and "piling on" after the ball has been declared dead.

[fol. 1386] The officers and trustees of the Football Coaches Association shared the concern of the Rules Committee as indicated in the draft of the following statement last June:

"It is reported that in some isolated instances brutal play is being tolerated. It is the unanimous expression of our officers and trustees that the coach is responsible for eliminating brutality in football. Training methods that are aimed at injuring the opponent should be done away with."

After long deliberations and a searching review of the rules it was concluded that the language in Rule 9 quite clearly defined the line between legal action and illegal

practices with willful viciousness to inflict bodily harm to an opponent.

The difficulty did not seem to be in rule construction but rather, first, in a laxness of officials to vigorously enforce the existing rules, and, second, the unwillingness of a few coaches to be worthy of their noble profession by properly instructing and disciplining their boys with regard to brutal play.

The various Conference Commissioners who have jurisdiction over officials will in no uncertain terms direct them to vigorously enforce all rules to stamp out malicious brutality and viciousness. Officials will be instructed not to exercise judgment about intent, but to rule on any overt act. By way of example, they will be ordered to penalize any contact with an opponent on the ground or in a "pile", after the ball is declared dead.

Not long ago a request was made of our fine coaches to help eliminate a developing muckerism, practiced by a [fol. 1387] very limited few, in feigned injuries and false starts. The coaches are to be congratulated on their magnificent response in the destruction of those evils. This is another appeal to our courageous head coaches to enlist their full force of influence to rid our game of inexcusable brutal and malicious play.

All of us, whose good fortune it is to be associated with our grand game, hold a sacred trust to crush any evil practices. We have under our trust the most precious possession of any father and mother, their son. Let us join together in being worthy of our stewardship in the protection, on both sides of the line of scrimmage, of those sons from brutality which will only lead to tragic incidents and rule changes that none of us will like.

William D. Murray, President
American Football Coaches
Association

H. O. (Fritz) Crisler, Chairman
NCAA Football Rules Committee

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT No. 21

February 22, 1963

Mr. Pierre Howard, Attorney
1324 Healey Building
Atlanta 3, Georgia

Dear Mr. Howard:

This is a letter form verification of our agreement in regard to a story which has been given to me exclusively for [fol. 1388] the Saturday Evening Post by Mr. George Burnette. It is agreed that the Saturday Evening Post will through me, as their agent, pay for Mr. Burnette's benefit the sum of \$2,000.00 for having given the full details and story to me; that if this story is published by the Saturday Evening Post as the exclusive revelation of Mr. Burnette and contingent upon the signing of a contract to be furnished by the Saturday Evening Post that we will pay Mr. Burnette an additional \$3,000.00.

It is further agreed that I will present to the Post, for the protection of Mr. Burnette my recommendation that the accepted standard in the industry for royalty and resale rights be adhered to.

Very truly yours,

Frank Graham

THE CURTIS PUBLISHING COMPANY AND DOMESTIC SUBSIDIARIES

Consolidated Balance Sheet

	December 31,	
	1962	1961
Assets		
Current		
Cash	\$ 12,507,000	\$ 12,888,000
Marketable securities, at amortized cost		353,000
Accounts receivable	22,119,000	22,129,000
Inventories	18,412,000	21,069,000
Prepaid expenses and advances	2,595,000	1,886,000
Total current assets	55,633,000	58,325,000
Investments and advances	3,065,000	2,947,000
Property, plant and equipment	64,625,000	63,980,000
Other, principally goodwill	4,487,000	4,977,000
Total assets	\$127,810,000	\$130,229,000
Liabilities		
Current		
Bank loans	\$ 22,100,000	\$ 7,600,000
Long-term debt due within one year	2,593,000	1,500,000
Accounts payable	7,432,000	11,097,000
Accrued expenses	9,797,000	5,371,000
Total current liabilities	41,922,000	25,568,000
Long-term debt	17,418,000	14,096,000
Subscription contract deferrals	40,538,000	43,716,000
Total liabilities	99,878,000	83,380,000
Stockholders Equity		
Prior preferred stock, no par value, additional \$1 dividend cumulative to extent earned		
\$3 cumulative	16,724,000	16,724,000
Authorized and issued—334,470 shares, stated at		
\$.60 cumulative	2,394,000	2,394,000
Authorized and issued—239,418 shares, stated at		
Common stock, par value \$1 per share	3,457,000	3,457,000
Authorized and issued—3,457,336 shares	22,575,000	22,575,000
Capital surplus	808,000	808,000
Retained earnings	4,666,000	23,583,000
	28,049,000	46,966,000
Less 15,500 common shares in treasury, at cost	117,000	117,000
Total stockholders equity	27,932,000	46,849,000
Total liabilities and stockholders equity	\$127,810,000	\$130,229,000

The accompanying notes are an integral part of these financial statements.

EXHIBIT "A"

THE CURTIS PUBLISHING COMPANY AND DOMESTIC SUBSIDIARIES

Statement of Consolidated Income

	1962	1961
Net revenue from advertising, circulation and other sources	\$149,284,000	\$176,963,000
Costs and expenses		
Production and delivery	106,591,000	116,492,000
Selling, general and administrative	58,280,000	62,672,000
Depreciation and depletion	5,456,000	5,634,000
Interest	1,673,000	1,169,000
Recoverable federal income taxes	(3,799,000)	—
	<u>168,201,000</u>	<u>185,967,000</u>
Loss from operations	18,917,000	9,004,000
Gain on sale of securities in associated companies	—	4,810,000
Net loss for the year	<u>\$ 18,917,000</u>	<u>\$ 4,194,000</u>

Statement of Consolidated Retained Earnings For Year Ended December 31, 1962

Balance at beginning of year	\$23,583,000
Net loss for the year	18,917,000
Balance at end of year	<u>\$ 4,666,000</u>

The accompanying notes are an integral part of these financial statements.

OPINION OF INDEPENDENT ACCOUNTANTS

To the Stockholders and Board of Directors
The Curtis Publishing Company

In our opinion, the accompanying statements present fairly the consolidated financial position of The Curtis Publishing Company and its domestic subsidiaries at December 31, 1962 and the consolidated results of their operations for the year, in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year. The accounts of two subsidiaries are maintained on a cash basis; however, memorandum entries have been applied to the cash basis accounts in the accompanying statements to state them on the accrual basis. Our examination of these statements was made in accordance with generally accepted auditing standards and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

Philadelphia
February 18, 1963

PRICE WATERHOUSE & CO.

THE CURTIS PUBLISHING COMPANY AND DOMESTIC SUBSIDIARIES

Notes to 1962 Financial Statements

Basis of consolidation

The financial statements include the accounts of The Curtis Publishing Company and its domestic subsidiaries. The Company's other subsidiaries, wholly owned and situated in Canada, are Curtis Distributing Company, Ltd. and T. S. Woollings and Company, Limited.

Accounts receivable

Customers	\$ 17,440,000
Less allowance for doubtful accounts	286,000

Recoverable income taxes	17,154,000
Nonconsolidated Canadian subsidiaries	4,136,000
	829,000

Inventories

\$ 22,119,000

Paper and other materials and supplies, stated generally at the lower of cost or market

Publications in process, manuscripts, etc., stated at cost	\$ 12,484,000
	5,928,000

Investments and advances

\$ 18,412,000

Nonconsolidated Canadian subsidiaries

\$ 2,043,000

Other companies, at cost

1,022,000

\$ 3,065,000

The Company's aggregate equity in the net assets of its Canadian subsidiaries exceeded the carrying value of its capital investment by approximately \$174,000, based on current rates of exchange at December 31, 1962. No dividends were received by the Company from its Canadian subsidiaries in 1962.

Property, plant and equipment, at cost

Land	\$ 2,333,000
Buildings	38,440,000
Machinery and equipment	102,155,000
Timberlands and wood rights	1,664,000

Less depreciation and depletion

144,592,000

82,909,000

61,683,000

Construction in progress

2,942,000

\$ 64,625,000

At December 31, 1962 the Company was lessee under long-term leases with aggregate annual rentals of approximately \$1,200,000.

Long-term debt

The Curtis Publishing Company

6% subordinated income debentures, due 1986 (less \$635,000 debentures in treasury at par value)

\$ 9,970,000

4½% notes to others, due \$800,000 annually in 1963 and 1964, \$500,000 in 1965 and the remainder in 1966

2,300,000

Instalment purchase contract payable to supplier, due \$11,000 monthly including 4½% interest through July, 1967

616,000

New York & Pennsylvania Co., Inc.

First mortgage 3¼% bonds, due \$375,000 quarterly through October 1, 1965

4,125,000

Notes to banks with interest at ½% over prime rate, due in quarterly instalments beginning October 1, 1963 in amounts equal to 1/40 of the principal to the date the first mortgage bonds are paid in full and 1/20 of the principal thereafter; guaranteed by The Curtis Publishing Company

3,000,000

20,011,000

2,593,000

\$ 17,418,000

Less long-term debt due within one year

Under the terms of the first mortgage bonds, New York & Pennsylvania Co., Inc. mortgaged its property, plant and equipment and assigned the shares of stock representing investments in its domestic subsidiaries. Under the terms of the notes to banks there are certain restrictions relative to the payment of dividends by New York & Pennsylvania Co., Inc., so that at December 31, 1962 consolidated retained earnings are not available for payment of dividends.

Subscription contract deferrals

Subscription contract deferrals represent the unearned portion of gross subscription revenues less related commission expenses stated at estimated amounts allocable to future periods. The balance of such deferrals has been increased by \$1,600,000 at December 31, 1961 with an increase in accounts receivable to reflect the unpaid portion of pay-during-service contracts from independent agencies.

Contingent liabilities

The Company is contingently liable in respect to sundry tax claims, lawsuits, and other matters incident to the ordinary course of business. The eventual liability, if any, is not readily determinable but in the opinion of counsel is not material. At December 31, 1962 the Company was guarantor for \$1,035,000 on obligations of nonconsolidated affiliates.

Stock options

On December 6, 1962 the Board of Directors of the Company adopted a Restricted Stock Option Incentive Plan, subject to approval by the stockholders. Under the terms of the proposed Plan, a maximum of 300,000 shares of common stock will be reserved for issuance under the Plan from time to time. Options under the Plan will be granted by the Board of Directors to officers and other key employees at an option price per share which will be the lesser of (1) 85% of the fair market value on the date of grant, and (2) 85% of the fair market value on the date upon which the option is exercised.

Mr. Culligan, President of the Company, has been granted options for 50,000 shares of common stock at an option price of \$6.8875 per share (95% of the fair market value on the date of grant) exercisable cumulatively as to 20% of such shares in each year commencing January 1, 1963 to July 8, 1967.

Mr. Clifford, Executive Vice President of the Company, has been granted options for 20,000 shares of common stock at an option price of \$6.32 per share (85% of the fair market value on the date of grant) exercisable as to 25% of such shares from May 1, 1963 to January 1, 1964, 50% in 1964, 75% in 1965, and all such shares from January 1, 1966 to October 15, 1972.

Of the foregoing 70,000 shares, 15,500 of the shares under option to Mr. Culligan are available from common stock held in the Company's treasury and the options for the remaining 54,500 shares were granted contingent upon approval of a proposed increase in authorized common stock by the stockholders.

Dividends in arrears

Including the dividends accruing January 1, 1963, the Company is in arrears in payment of cumulative dividends on prior preferred stocks as follows:

	Per Share	
\$3.00 cumulative	\$5.25	\$1,756,000
.60 cumulative	1.05	251,000
		<u>\$2,007,000</u>

Federal income taxes

At December 31, 1962 the consolidated group had unused operating loss carryovers aggregating approximately \$22,380,000 and unused investment tax credits of \$363,000.

Father Is a Football Coach

By JEAN BUTTS JONES,
as told to Furman Bisher

The author, daughter of Georgia's Wally Butts, reveals what it's like to be raised in a football family. "If I had to start over," she says, "I'd still be the daughter of a coach. But it can be an awful millstone on a girl's romantic life!"



Wally Butts at his Athens, Ga., home with his daughter, Jean, now a coach's wife. "To marry an underprivileged high-school coach?" he exploded, when Jean got engaged. "That's going too far!"

ABOUT THE AUTHOR

Twenty-two-year-old Mrs. Jean Butts Jones is the daughter of one football coach and the wife of another. Her young husband, Frank Jones, coaches the high-school team in Decatur, Georgia, while her father is the famous Wally Butts, dean of the rugged Southeastern Conference, now in his sixteenth season as head coach at the University of Georgia.

Jean is the "middle" daughter in the Butts family of three girls, and with the possible exception of Wally, she has been the most sports-minded person in the household. As a Georgia

coed she was the only girl in her gym class who could do ten push-ups. In football seasons she helped the Georgia cause along as a cheerleader.

Jean majored in journalism at college, and after graduation got a job with the Atlanta Journal. In addition to her work as a newspaper reporter, she sometimes speaks at high-school football banquets. In her speeches she takes much the same light, whimsical line as her father, whose Southern humor is famous at after-dinner speeches all over the country.

—The Editors.

Butts girls—Jean, Faye and Nancy—visit their dad at the practice field. Jean claims that those "silly beasts" who play college football are afraid to show any interest in a coach's daughter.



[fol. 1393]

1057

WHEN I announced to my family last year that I planned to marry a high-school football coach I had been dating a few months, everyone was pleased except my father, who went up in a puff of smoke. "Marrying any football coach is bad enough," he said in a volcanic mood, "but to marry an underprivileged high-school coach, that's going too far."

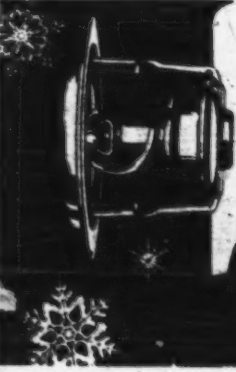
My father, Wallace Butts, has been a football coach since 1928, the last sixteen years at the University of Georgia, in Athens. I consider an authority on matters of football, and on the field he has an extensive reputation as a taskmaster. But he found out you can't coach love, and, to prove it, a few weeks later he marched down the aisle of the First Methodist Church in Athens to give me away to that "underprivileged" high-school coach.

First, let me set the record straight. My husband, Frank Jones, is not an underprivileged coach. His teams at Decatur High School, in a suburb of Atlanta, have won three region championships in a row and twice got to the Georgia state semifinals play-off, each time losing by one point. In two seasons his team lost only one regularly scheduled game. Actually, I think my father was flattered that, after observing a coach's life from the inside for the greater part of my twenty-one years, I should still be brave enough to marry one.

I've heard him say many times, "I know the futile feeling of a high-school coach. I was one myself for ten years, and when I found I was on a dead-end street, I happened to get a college break. But there are still only a hundred good coaching jobs in the country. The field is too limited. You meet a lot of nice people, but you never make any money."

My father is a renowned pessimist, but really, I don't think that coach Wallace Butts or any member of his family has any grounds for complaint. If I had a chance to start over again, I'd still choose to be the daughter of a football coach and the wife of one. I didn't marry

(Continued on Page 170)

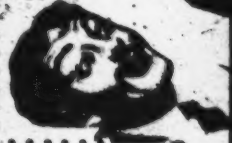


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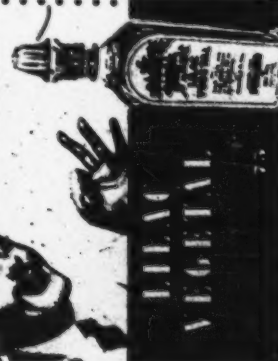
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FATHER IS A FOOTBALL COACH

(Continued from Page 37)

Frank Jones because he was a football coach, but it didn't hurt his chances any. When I thought about marrying Frank, I remembered something important. Daddy was installing the split-T formation at Georgia, and Frank had coached the split-T several years, so I knew they'd have something in common.

It worked out just beautifully. It's awfully pleasant to sit around and listen to the menfolk talk about over-shifting and the option play and brushing blocking and such. A lot of wives wouldn't appreciate it, but when you're raised in a football family it comes just as naturally as matters of the church come to a preacher's family.

A football family doesn't live or die with each victory or defeat, but winning does improve the atmosphere around the house considerably. It isn't, however, quite so serious as Frank made it out to be just before we were married. His team had lost heavily by graduation, and the material looked rather poor for the 1953 season.

In a very serious mood one day, he said to me, "I'm awful sorry our first year will have to be a losing year." As it turned out, it wasn't, but I still chuckle inside when I think of this coach-bus-band being so greatly concerned about how many games he would win for his bride.

I got my indoctrination early in the vagaries of the coaching family's life. Here's something they may have forgotten when I was only three years old—I remember little about it myself.

Daddy was coaching at Male High, in Louisville, Kentucky, at the time. The big game with Manual High was coming up, and already in those days the name of Wallace Butts was becoming synonymous with pessimism. He had been moaning low around the house all week, telling anybody who would listen to him, "Well, if we lose this one, I guess we'll have to pack up and get out of town."

Male High did lose. I was too little to go to the game, and when they came home and I heard the bad news and saw the sorrowful expressions on their faces, I went up to my room in tears. When my mother came up she found me packing my dolls and clothes. I had taken my pessimistic papa at his word. I was getting ready to get out of town.

We have been a rather fortunate family as football fortune goes. There has been none of the gypsy life for us, here one year and there the next, none of the continual moving and living from one job to the next that is the lot of some coaches. But there have been rough times, like 1951. That was one of daddy's hardest seasons. The Georgia squad was inexperienced and slow. Some businesses he had an interest in, including a restaurant in Athens, took a bad turn. Everything went wrong at the same time, except a sophomore quarterback named Zuke Bretkowski. Fortunately, Zuke came through in a spectacular way, and eased the pain of a season that ended with five victories and five defeats.

In 1953, daddy experienced another season of depression, though by this time I was gone from the family circle and had the problems of my own coach on my mind too. Georgia won only three games and lost seven, the worst record in daddy's whole coaching history. But this distressing season had a

positive rather than negative effect. It was plainly evident that Georgia just didn't have the material. Instead of starting a fire-the-coach campaign, Georgia supporters rallied together in the biggest wave of college spirit the state has ever known.

We Buttses have been lucky like that from the start. The game that sent me to my room packing at three was the only one daddy lost to Manual High in three seasons in Louisville, where his record was so impressive that he was hired as an assistant coach at Georgia in 1938. He was appointed head coach in 1939, and since that time his teams have won 104 games, lost fifty-two and tied seven. They have played in seven bowl games and won the Southeastern Conference championship three times.

Daddy was born and grew up in Mill-ledgeville, Georgia, and in February, 1929, he eloped with his home-town sweetheart, Winifred Taylor. He was just out of Mercer University, where he had been a 165-pound end, and was on his first job at Madison A. & M., in Milledgeville, Georgia. He returned to Mill-ledgeville in 1932 to coach at Georgia Military College, a prep school. With the family now increased by two—my older sister, Faye, and myself—we moved to Louisville in 1935. There the third daughter, Nancy, arrived. Then came the final move, back to Georgia and the state university, and here the four Butts women seriously began the process of bringing up father.

There's a tradition, it seems, that football coaches never have sons—they lean predominantly toward the production of daughters. You might think these daughters would have easy access to the manly boasts their fathers coach, but it doesn't work out that way. Being a coach's daughter can be an awful millstone on a girl's romantic life.

A coach's daughter is the last girl in the world a football player is likely to show any interest in, for fear that the other boys will accuse him of playing politics. But if one does happen to be so bold, he is (1) afraid to come around to the house, (2) watching himself like a hawk to keep from violating training rules, and (3) about as much at ease as an escaped convict calling on the sheriff.

On the practice field, you see, my father is as intense as a drill sergeant. He expects his players to work as hard as he is willing to work. The players expect him to be just as tough around home, which is a laugh. We Butts girls always have had him under control, and the tough-taskmaster characterization seems unreal to us.

I have always been a worshiper of the handsome, heroic athlete, but as I grew up, my romantic opportunities with members of the football team were seriously limited by fear of the coach. On bowl trips or away from home, dates came easily with them. But in Athens the players kept their distance, because it meant coming to the house for me or bringing me home.

If they could come around in a group, players were much more at ease, although this didn't always work either. One night I had a little party for some girl friends and their dates, most of them football players. As daddy came in simply to say hello in his most polite manner, one of the boys was so frightened he jumped over a sofa and ran out into the yard to escape.

It hasn't been so hard on Nancy, the youngest, for she has had the benefit of observing her two older sisters. Besides, she's a brash teen-ager who says what she thinks and flinches before no one. Daddy has often said that she is his best critic.

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"What do you think about your sister marrying up with a football coach, Nancy?" he asked her, driving to town one day.

"Well, we've had to put up with you," she said, "and it hasn't been too bad."

"How do women go around picking a husband, anyway?" daddy said. "Don't you think she could do better? That fellow wouldn't win any beauty contest, you know."

"Well, look who's talking! You're a good daddy, I'll give you credit for that, but you're no raving handsome beast yourself. Besides, you wouldn't know anything about boys and romance, so why don't you leave those things to the women in the family?"

Nancy has had her trying moments, though. A couple of years ago she was beauty queen of the sophomore class at Athens High School, but on the day of her selection she came home in tears. One of the judges had been Bob West, the captain of the football team, and some of the catty gossips around school had been whispering that Nancy won it in a "fix." She was grief-stricken.

Daughters can be a coach's asset in the process of player recruiting. A con-

The only man in history who never looked at another woman was named Adam.

—CARL ELLSTAM.

stant battle goes on the year round for the high-school football stars who have college ability. All of us have pitched in to give daddy a hand, though I can't honestly say that we have ever been the lone determining factor.

Once I thought I was going to be, and I threw myself into the case with enthusiasm. The player was a handsome young tackle from Ohio. He played the piano beautifully and he had wonderful manners. Mother thought he was something sensational, and daddy thought so, too, though their perspectives were miles apart.

Finally, the boy smiled across the piano at me, like Liberace, and said he'd come to Georgia if I'd promise to date him. I did my part. I promised, and the tackle came to Georgia, but something happened that was entirely out of my hands. They found out he was ineligible for some reason or other, and the tackle eventually transferred to a school out West.

Many times I've wished I had been born a boy, so I could have played football and helped daddy. I've always done the next best thing. I had an awful scrap with a boy when I was in the fourth grade. He said some things about daddy that weren't nice and I popped him. They sent him to the principal's office and let me go free.

When I was a student at Georgia, Faye and I both attended the university, and Nancy will too—I was a cheerleader. I majored in journalism to help him with his propaganda. Now, on the Atlanta Journal, I'm on the city staff rather than in the sports department, but I do write a series of feature gsch fall weekend about bitter rival Georgia Tech. These pieces take the form of "scouting letters" to daddy.

Right after my wedding, Bobby Dodd, the head coach at Georgia Tech, quipped at a banquet, "Coach Butts is using unfair tactics. He's training his

daughters to be newspaper reporters to get all the people on his side, and marrying them off to football coaches to get all the players." I hope it works, I might add.

Football coaching is a twelve-month grind that hits a peak of pressure in September, October and November. We have always tried to make life around the house as easy and as pleasant for our coach Butts as possible, but it's difficult with daddy. Relaxation never has been a natural thing with him. He works as hard at relaxing as some people do at work.

We did get him off to St. Simon's Island on the Georgia coast last summer, and each morning at the miser-able hour of four o'clock we arose to go deep-sea fishing with him. He got sick every time he went out, and we wound up doing most of the fishing. After a few days of these predrawn sleep wreckers, we began to investigate. We found out that he really didn't give a hang for deep-sea fishing. He had been showing enthusiasm for it just to please us. That ended the deep-sea excursions and we all resumed our delightful sleep, with which the vacation became a vacation again.

He isn't much for swimming either. Once we gave him two dazzling new swim suits for Father's Day. A bright high-school prospect hit town that same weekend. I asked the prospect if he'd like to go for a swim, and when he said he didn't have a suit with him, daddy gave him both of his new ones.

Once, about five years ago, mother decided that he needed a new hobby that would completely captivate him. She selected golf for him, and gave him a set of the finest new clubs she could find. This was not a good idea, for he doesn't like to do anything he can't do well, and so he played with feverish intent at becoming a good golfer. He was knocking himself out, working on his woods, practicing his irons, haunting driving ranges by day and night. Finally, after six or seven months, mother convinced him he should give it up. It had ceased to be a hobby any more. It had become his master, and he was a slave to his passion for the game.

There is no escape for any football coach from the natural hazards of his profession, such as antagonistic alumni, ticket moochers, anonymous telephone callers, doctored parents of players—especially mothers—and sidewalk quarterback. In that terrible 1951 season we tried to get him to have an on-and-off switch installed on the telephone or to have an unpublished number, but he wouldn't have any part of it.

"Part of my job is talking to the people who are interested in football at Georgia," he said. "They wouldn't be calling if they weren't interested. I can spot the phones and I can hang up on them, but I'll still give them the chance to call."

Another big problem is last-minute calls for game tickets. Often close friends are just as guilty as anybody. A couple of years ago an old acquaintance who should have known better phoned the day before the Georgia-Georgia Tech game, the state's football World Series, and asked for twenty-two tickets. There not only wasn't an extra ticket at our house, there wasn't one in town. Daddy told the man, an influential Georgia alumnus, that asking for twenty-two tickets was one of the best jokes he'd heard in a long time, but if the man would settle for twenty less, he could take care of him. Then he came begging to the woman in his life. Only Faye had extra tickets

"Gee, boss, I think you're swell..."



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and she'd been planning for weeks to take two friends with her.

"But this is important," daddy pleaded. "This is for —, and it might be bread and butter in our mouths. You don't want to see your poor old daddy cold, hungry and penniless just because you wouldn't let him have two little old football tickets back in 1932, do you?"

"I'll let you have them for twenty-five dollars," Faye said.

"But that's scalping," daddy boomed, "and you know I don't approve of scalping!"

"I don't approve of fathers' taking advantage of defenseless daughters either. I think I'm being quite reasonable. I know of some tickets that are selling for fifty dollars a pair. Twenty-five dollars is my price. Take it or leave it."

Reluctantly "daddy dug into his pocket and shelled out the twenty-five dollars; then turned around and let the "influential alumnus" have them for game price. We have never let him forget the time he was ticket-scalped by his own daughter.

Game days are always hectic days at our house, a twelve-room red-brick place on a large, shady block of Highland Avenue in Athens. Every bed is always filled, and relatives and friends drop by in a steady stream from Friday night until late into Sunday morning. The football Saturday usually begins with daddy arising at 6:30 a.m. He never sleeps very well the night before a game. Mother gets up and has breakfast with him, but there isn't much conversation. Some days he is uncommonly cheerful — this mood usually coincides with games which Georgia has been picked to lose decisively. He'll read the morning paper — he follows the newspapers avidly — then drift away without saying good-by to anybody. We won't see him again until we arrive at the stadium, and then our view of him is no better than any other spectator's.

After the game we never know what to expect. If Georgia has won, usually droves of miscellaneous people show up to offer congratulations. If Georgia has lost, only the people who were invited to dinner show up, and they are customarily full of patronizing condolences.

I can't rightfully say that the family suffers as hard through the actual game as daddy, for he is one of the worst sufferers in the coaching business. For the longest while he had a habit of chewing snigs of grass during the game, like Nebuchadnezzar, the king of Babylon. His stomach began to bother him, and while daddy thought it was being caused by defeat, his doctor told him it was grass. Then he switched to chewing gum. He breaks up the sticks into little pieces and eats — not chews — them during a game.

While he is having his troubles on the field, his family every so often is having trouble of its own in the stands. The worst of these occasions took place while Georgia was losing a heartbreaker to Alabama, 14-7, at Athens in 1949. Everything seemed to go wrong for Georgia that day, and a very fat man sitting directly in front of me decided it was daddy's fault.

"Let's get rid of Wally!" he boomed. No matter what happened, that was his cry. "Let's get rid of Wally!"

Now I realize, of course, that neither my father nor any other football coach ever will achieve universal popularity, even if he should win them all, but it does grate somewhat on the tender nerves of a loving daughter to hear her

old man attacked like a baseball umpire. All the while this fellow was bel-lowing at my father I'd been eating peanuts and placing the hulls on his hatrim. When he took his hat off, the hulls fell down his back and inside his coat and in his eyes, and he turned furiously on me.

"Yes, I did it," I told him, "and I'm glad. That's my father you've been shouting at, and we love him. Besides, we like to eat, and we can't if he hasn't got a steady job."

He really was a very nice man. He spent the rest of the afternoon apologizing to us. "It isn't that I don't like coach Butts," he said, "but it's just because I love Georgia so much I hate to see them lose." And I guess that's the way it is with most football fans.

He loves to show up at mother's teas and stand in the receiving line. When I had parties, he always joined in to help with the serving. It gave him a chance to act cute. He has always lavished gifts on us, and I must say that he's much better about sizes than mother.

There seems to be something magnetic about his personality that attracts characters of all types and all descriptions. This is perhaps native in all football coaches, but in coach Butts to be overdeveloped. Even our cooks have been characters, such as the one who had to resign to have her ninth child without benefit of a husband.

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HAZEL



"Breakfast's at eight."

THE SATURDAY EVENING POST

It's still pretty hard on a coach's family in a losing season, though.

As you can imagine, daddy is very sensitive to defeat. After the Orange Bowl game in 1949 daddy just wouldn't budge from his room. Georgia had won the Southeastern Conference championship and had been favored to beat Texas, a three-time loser, on New Year's Day. With no pressure on, the loose Texas team won, 41-28 — the only major bowl game daddy ever lost. Daddy was simply crushed. They always throw a big postgame party for the players and coaches at a night club in Miami, but daddy refused to go. While mother dressed in her prettiest evening gown, daddy crawled into bed, and nobody could reason with him.

After a while there was a knock on the door, and when mother opened it, there stood Frank Leahy, of Notre Dame, one of daddy's closest friends, and two Catholic priests. They were so appropriately solemn that it looked as if they had come to administer last rites. Mother started laughing, and then daddy, and then all of us. That broke the spell. Daddy got up and dressed and went off to the party to face the music.

Many of his players think of him only as a football coach. If they could see him around the house, those Georgia Bulldogs would never believe it. While he has never washed a dish in his life and couldn't fry an egg without an instructor, he is otherwise a well-domesticated animal.

been a flap-mouthed Negro waterboy. A trainer named Clegg Stark, who doesn't know his own age or how long he has been there. They say that Clegg once was able to throw a football the length of a field. The late Grantland Rice prevailed upon him to demonstrate his mighty arm when Georgia played New York University in New York some years ago. He so amazed the sports writers that several of them wrote at length about the fabulous Negro waterboy from Georgia.

Clegg is held in such esteem by past Georgia football players that they raised a fund to buy him a new house. Then came time for the touching presentation, and old Clegg, wearing his red-and-black Georgia sweater, stood there with his head bowed in humility, occasionally wiping away a dripping tear. Then he stopped forward to make his acceptance speech.

"I also do appreciate this from you boys," he said. "But who's gonna pay the tax on it?"

Daddy has had his player characters, too, not the least of whom was a flat-footed, slope-shouldered halfback from Ohio. This player had great talent, but he almost drove daddy wild with his flightiness.

Now, a player's problems are the coach's problems, too, no matter how personal they may be. Romance-stricken Georgia players have come by home many a time to tell daddy they wanted to get married. I've seen the terrified bride-elect sit in the parlor

while daddy grew furious with the player in the den. He has always maintained that marriage and college don't mix, mainly for financial reasons. Sometimes daddy has been able to restrain romance, but more times than not he has been the loser.

One day in the spring of 1941, this flat-footed, slope-shouldered boy came by daddy's office and told him he was quitting football. "I want to live a normal student's life," he said. "I want to have some time for a girl friend, like the other fellows on the campus."

This set off another explosion by coach Butts. Spring practice opened without the boy among those reporting, and daddy was resigned to losing him. About a week later, though, the boy came riding into his office and wanted to know if he could rejoin the team.

"I don't know," daddy said. "I'll have to take a vote of the squad to see."

I'm not sure of this, but I've got a hunch that when the boy went out one door, daddy rushed out the other to hold his ballot. And when the players are elected to take the boy back, I'm sure it saved daddy from having a heart attack, for the boy was Frank Sinkwich, in daddy's own estimation the greatest player he ever coached.

Another great one was Charley Trippi, the big star of the only perfect season — 1946 — that Georgia has had in modern times. Trippi, now with the Chicago Cardinals, was a cold-blooded businessman both on and off the field. But he was a tremendous athlete who could do everything well, and that season he was an overwhelming All-American selection.

Looking back on it all, I can't contend that I've been especially blessed by being a football coach's daughter. Coaches don't make the best fathers in the world, because you don't get to see enough of them.

The months from September to December you may as well scratch off. If you are with him, he's got his mind on 900 other things and seldom knows you're alive. But I don't care to trade my pessimistic papa in on a new model.

Life in a coach's family, with all its hazards, has given me something extra. We've had our trips to the Rose Bowl, to the Sugar Bowl, to the Orange Bowl; and we've had our parties and rubbed shoulders with celebrities. I got one of the greatest thrills of my life when Joe E. Brown introduced me to some friends in New York as "Miss Butts, whom I met in Atlanta." If I hadn't been the coach's daughter, he'd never have remembered me. Other children envied us and our "connections" and "influence" with the coach, and I always felt the envy was justified. I'd have envied them if they'd been in my place.

As a coach's wife now, I find myself living through many of the same joys and agonies I saw my mother experience. She suffered silently with Georgia, but I die violently with Decatur High School. I'm a nervous bundle of screams and hollers and other assorted noises during a game. In football matters my father's nature dominates me. We're both pessimistic. We both feel that anybody who isn't fur you is agin you. We both hate to lose, passionately. They call him "The Little Round Man" and me "The Little Round Girl."

Eventually, though, I feel that the lady in me will take over and I shall become the exemplary wife of a football coach. I have been exceedingly well trained for the position. THE END



Locker-room session between the halves of the Georgia-Chattanooga game. The air of gloom was not justified by the final score: Georgia 12; Chattanooga 6.

Georgia Plays for Keeps

By FRED RUSSELL and GUY TILLER

ONE Saturday in 1947, Wally Butts, the exacting drillmaster of University of Georgia football, was attempting to build a fire under a subpar team which had lost the week before to Kentucky by 28-0. After concluding one of the most emotional appeals of his hard-driving career, Wally asked Jules Verne Sikes, then Georgia end coach and now University of Kansas head coach, to check the squad's reaction.

Sikes casually fell in alongside Bob Walston, a freshman halfback upon whom much of Georgia's success depended that day against the Oklahoma Aggies. They strolled toward the players' entrance, through which Georgia players must never walk, but sprint.

"You're all set to give 'em hell, aren't you, Bob?" Sikes asked.

Walston, a cool performer from Columbus, Ohio, looked Sikes straight in the eye, as is demanded of all Georgia players when addressing a coach, and gave the obvious reply, "Yes, sir, Coach Sikes." Then, before he streaked onto the stadium turf, Walston whirled and said to Sikes, "But if we get near that Aggie goal line, you better send in Coach Butts. He's really ready."

Walston, now an ace Georgia end, wasn't wisecracking about his coach, whom he both fears and respects. None of Wally Butts' strictly disciplined

players would dare take such a liberty. Walston was simply stating a fact. On the day of a game, Coach James Wallace Butts, Jr., is always "up"—so highly keyed, in fact, that he avoids his players as much as possible, for fear that he will cause them to become too taut.

Nor would Walston's idea of inserting Coach Butts in the line-up sound too farfetched to those who have seen Wally, at forty-four years of age, bulldoze one of his huge athletes in demonstrating the proper blocking form.

Butts is a stocky, powerful man, built along the lines of a fire hydrant. He stands only five feet, six inches, but weighs 195 muscled pounds. This coach, whose 1948 Georgia team won the Southeastern Conference championship, is such a fanatic on physical conditioning that until 1942 he held daily wrestling matches with giant freshman coach Quinton Lumpkin, six feet-two, 225 pounds. Only Lumpkin's entrance into the Navy stopped the bruising sessions. Then Wally took to doing five miles of road work daily. He's always ready. When Georgia lost to Kentucky again in the fourth game of the current season—this time 28-0—Butts was in shape to carry the ball himself, and probably considered doing so.

PHOTOGRAPHY BY FRANK ROSS

Despite a so-so season this year, few coaches can match the success of Wally Butts, whose teams have smashed their way to six bowl games in eight years. He is a hard-driving perfectionist who is either loathed or loved.

Wally Butts has been going hard from his small boyhood in Milledgeville, Georgia, where he was born on February 7, 1905. "Wally's father was, and still is, in the business of felling trees, moving safes, transporting homes to new locations and almost any other type of handy-man job," declares Jere Moore, editor of the local newspaper. "When Wally was knee-high to a cat, he helped his father. He was so busy helping his father that he never had time to get into any mischief or hang around any of the town's joints. When he was a tiny shaver he would spend what few free moments he could squeeze out of his father playing football by himself. He drove himself at a killing pace even then, for his one desire was to be a football star. He finally interested other kids in playing with him, and, although he was one of the smaller boys, he controlled the games. If a big boy picked on a smaller lad, he had to whip Wally. Very few ever achieved that."

When Butts first reported as a kid candidate at Georgia Military College, then a prep school, he was so small that other boys reached over his head into the grab bag of equipment. Butts didn't get a stitch.

[fo]. 1397]

But he turned up the next day in tennis-shoes and a pair of faded pants, stuffed and stitched with cotton by his mother. Another little obstacle, having to milk nine of his father's cows every afternoon after practice, didn't stop him from making the team.

Later, as an end at Mercer University, a Baptist school in Macon, Georgia, he became captain in 1927 and was chosen for the All Southern Inter-collegiate Athletic Association team. Bernie Moore, present commissioner of the Southeastern Conference, coached Wally at Mercer. Moore later had such All-American flankmen as Gaynell Tinsley and Ken Kavanaugh at L.S.U., but he still ranks Butts as the best he ever saw at the vital assignment of blocking the opposing tackle.

However, Wally's greatest eminence has come as a coach. He has produced six bowl teams at Georgia in the last eight years. Listen to Notre Dame's Frank Leahy, addressing the Athens Touchdown Club in 1947: "I do not say this for home consumption; I have said it in Chicago, in New York and everywhere I have been asked about my fellow coaches. There is no finer coach in college football than Wallace Butts. There are no better drilled or better disciplined football teams in America than Georgia's."

Leahy and Butts are fast friends. They met at a high-school clinic in Texas in 1942. Each was deeply impressed with the other's offense and defense, and they soon became intimates. Butts annually spends a few weeks in South Bend during Notre Dame's spring practice; when Georgia plays a bowl game, Leahy usually is in Butts' room after each daily practice session.

Rival coaches point out that Notre Dame and Georgia pass patterns bear a striking resemblance. It is also significant that Notre Dame and Georgia both are using a new huddle formation this season, in which the players group themselves like this:

QB.
LT LG C RG RT
LE LH FB RH RE

After studying the defense, the quarterback turns, faces his teammates—who are looking toward the line of scrimmage—and calls the play. Advantages: It is more orderly than the normal huddle; it is easier to spot a fatigued or injured player; the players do not lean on each other; all can see the lips of the quarterback; and an assistant coach moving up and down the side lines can easily detect confusion among the team or spot any player who might be arguing with the quarterback.

There is at least one coach who says the Butts-Leahy co-operation goes further than huddles, pass patterns, new defensive strategy and cannily designed trap plays. Paul (Bear) Bryant, of the University of Kentucky, declares, "Every time I line up a truly great high-school player to come here, my hottest competition for him comes from Notre Dame. When we sign a boy to a Southeastern Conference grant-in-aid, we send his name to the commissioner, Bernie Moore, and all schools in the S.E.C. get a list of the boys who have signed with other schools. I believe Butts tips off Leahy on the top boys."

Wally Butts started coaching in 1928 at a small Georgia prep school, Madison A. & M. He tested his players' abilities by scrimmaging with the squad regularly until darkness called a halt. After developing a Southern prep championship team at Madison, he went in 1931 to his home town of Milledgeville to coach his own alma mater, Georgia Military College. After running up a record of thirty-seven victories and only three defeats, Wally moved in 1935 to Male High, in Louisville, Kentucky, where, in addition to coaching, he taught history. Here, too, Butts was successful.

His chance to join a college coaching staff came in 1938, when Harry Mehre left the University of Georgia for the University of Mississippi. Despite Mehre's record of defeating Yale five times when Old Eli was famous for more than saddle shoes and crew cuts, plus his feat of losing only twice in ten years to Georgia's traditional state rival, Georgia Tech, the university alumni kept grumbling for a conference championship and a bowl team.

Butts applied for the Georgia head-coaching job. A member of the university's athletic board asked



A characteristic Butts pose at a recent night game. Mentally playing each man's position, the coach chews grass, means when a player drops a pass, and despairs when the quarterback calls the wrong play.

Wally, "What system do you use?" Butts replied tartly, "I use the color system. I tell the boys simply to go out and knock down everybody not wearing our colors."

Butts did not get the No. 1 job, but he was hired as an assistant coach. Joel Hunt, who had been L.S.U.'s backfield coach, took the top spot, but after a mediocre season and several months of exposing his direct personality to ruffled alumni, Joel was paid off. Butts appealed to the athletic board to grant Hunt a hearing. When this plea was turned down, Wally accepted the head-coaching job himself for 1939.

He inherited a squad short of talent and short of breath. The latter was corrected immediately by a spring-practice grind that started in January and lasted until June, with only Sundays and a few other days off.

"Nobody was in shape when we started," recalls Wyatt Posey, now head coach at South Georgia Junior College, in Douglas.

"But everybody was in shape when it ended. The boys were weeded out from the men quickly. I bet half the original squad quit. They just wouldn't pay the price. That season darn near killed me, but, as trite or silly as it may sound now, it made a man out of me."

The summer following this back-breaking practice stretch was no vacation for Coach Butts and his chief assistant, J. B. Whitworth. Georgia was mired in red ink, but George C. Woodruff, wealthy Columbus, Georgia, alumnus and a former Bulldog head coach, backed up his confidence in Butts with a loan that allowed the athletic association to keep the sheriff away. Butts and Whitworth could entice few of the Southern prep (Continued on Page 125)

Wally Butts, who is a fanatic on conditioning, weighs the team daily before and after practice. He frequently prescribes lighter practice-field work and more milk for a player needing additional pounds.



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GEORGIA PLAYS FOR KEEPS

(Continued from Page 29)

sensations to join a losing Georgia team, so they headed into Pennsylvania and Ohio on a campaign that was Sherman's march to the sea in reverse.

Paul Jenkins, then coaching at Wally's old stand, Male High, tipped Butts about a halfback in Youngstown, Ohio. Paul could not remember the boy's name. The entire sports world found it out two years later, when Fireball Frankie Sinkwich started leading Georgia out of the gridiron swamps. To make certain that Sinkwich did not get homesick, Butts brought along Frankie's buddy, George Pocchner, who developed from a fourth-string halfback on the freshman team into an All-Southeastern end.

Wally's first Bulldog team in 1939 was not a success from a victory standpoint, losing to Furman, Holy Cross, Kentucky, New York University, Auburn and Georgia Tech. But the freshman team, liberally sprinkled with Pennsylvania and Ohio boys, went undefeated and was hailed as a point-a-minute whirlwind.

Butts' coaching record since 1939 is among the nation's best. His fabulous freshmen of 1939 won the Orange Bowl bid as juniors and trounced Texas

Christian University, 40-28. Georgia wrecked unbeaten Georgia Tech, 34-0, in 1942 to win the Southeastern Conference championship for the first time in history. This brought an invitation to the Rose Bowl, where U.C.L.A. was toppled, 9-0.

In 1943 Butts opened practice with a squad of seventeen-year-olds and 4-F's. With no reserve military unit at Georgia, Butts' 1943-44 record of thirteen victories and seven defeats is an often overlooked high light of his career.

Charley Trippi returned from the services in time to spark the 1945 team to an Oil Bowl triumph over Tulsa, 20-6. Then Georgia went undefeated and untied in 1946, for the first time since the 1896 team won four games without a loss. Trippi and a sophomore quarterback, John Rauch, set the pace as the Bulldogs squeaked past North Carolina, 20-10, in the Sugar Bowl.

Without Trippi, Georgia dropped four games in 1947, but played Maryland to a 20-20 deadlock in the Gator Bowl at Jacksonville. Last year Butts had his third S.E.C. title-winning team. He suffered his first bowl loss, though, when Texas won out in the fourth quarter at the Orange Bowl, 41-28.

Georgia isn't playing four of the highest-ranked teams in the Southeastern this year—Tulane, Vanderbilt, Tennessee and Mississippi—and, although protests by Butts that he has the worst material in the conference are

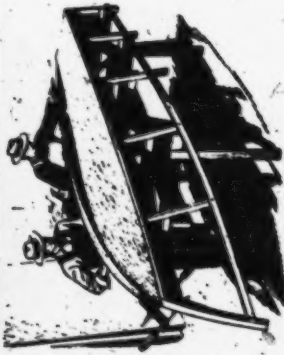
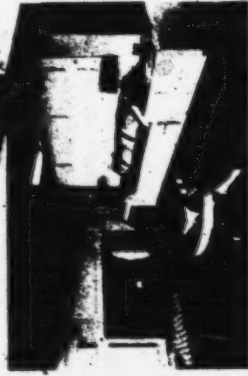
exaggerated, the Bulldogs are not probable contenders for the championship. However, Butts went into this season with a record—including bowl games—of seventy-nine victories, twenty-seven losses and three ties in ten years at Athens.

Except for the morning of the Georgia-Georgia Tech game, when he adopts an aggressive, coldly calculating attitude, Butts continuously moans that he cannot possibly win the next game. He has to this day never admitted having better material than even one opponent. Carter (Scotch) Latimer, who should have known better, once allowed himself to be a silent audience while Butts' tears splashed all over a Greenville, South Carolina, hotel room. Georgia's 1946 team was undefeated and favored to scatter little Furman all over Greenville. But, after listening to Wally, Latimer returned to his sports desk on the News and pounded out a column predicting that Furman would score an upset victory. The score: Georgia 70, Furman 7.

After one late-September scrimmage this year, Butts made, among others, the following characteristic remarks to the press: "There is not an end on this field who can block a tackle. . . . Our quarterbacks are a joke. . . . We can't possibly develop a running game without better blockers at guard. . . . I'll probably get fired after this season. . . . I could run better than most of

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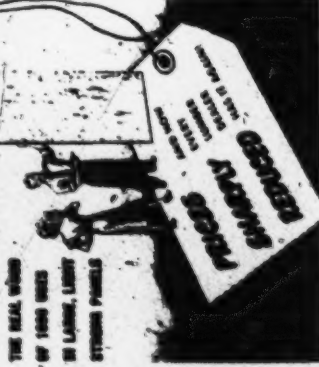


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THE SATURDAY EVENING POST

our backs, and I'm an old man. And I'll be much older before poor ole Georgia finishes this season."

Despite his excitement and temper displays at practice, Butts is at his quietest—though churning inside—on the morning of a game. Then his greatest concern is about the weather. "Some mornings he has made me call the weather bureau ten times, though they told me the same thing every time," reports Louis Trousdale, a former aide. "Coach always wants a dry back."

Butts' concern over the weather is understandable. The Bulldogs always fill the air with forward passes. Georgia gained 2101 yards on aerials in 1942, when Sinkwich's heaves alone accounted for 1392 yards, and Lamar (Race Horse)

Davis set a national record by averaging 28.5 yards per catch. The Georgia kid team in 1943 produced Johnny Cook, a seventeen-year-old whose tomes netted 1007 yards. In 1946, Reid Moseley, a Bulldog end, led the nation in most yards for a receiver, 662. Georgia set another conference mark in 1946 when twenty-three passes were fired for touchdowns and Trippi and Rauch completed 64.4 per cent of their tomes. Rauch gained more than 1300 yards in both 1947 and 1948 on passes.

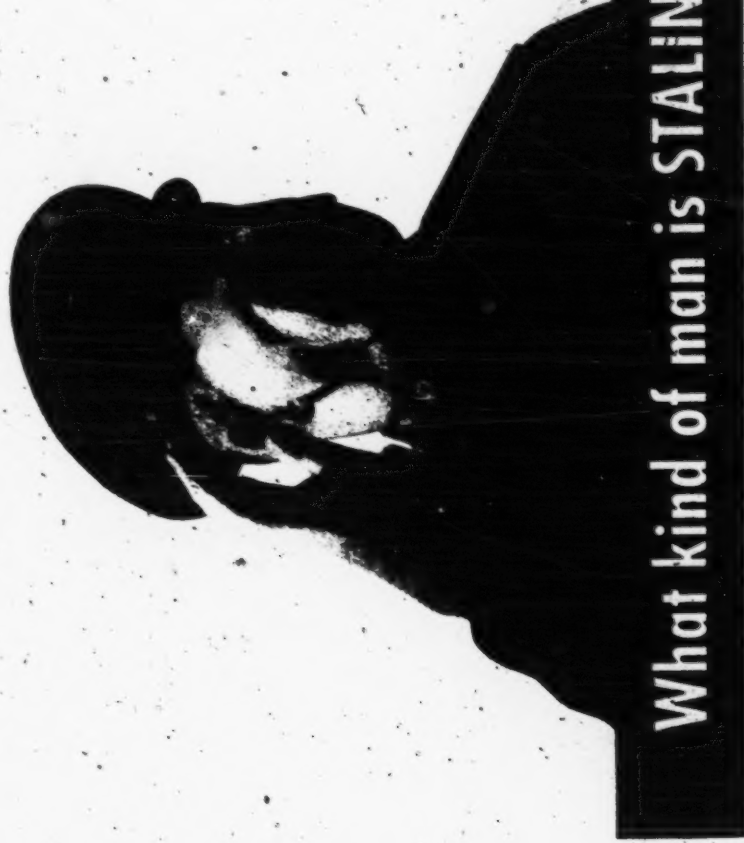
Bo McMillin, former Indiana coach who now directs the professional Detroit Lions, explains it this way: "When Wally was on the All-Star coaching staff with me in Chicago, he drew up a few of his intricate

pass patterns. Another member of the staff said he doubted the plays would work because he did not believe four receivers could get out in the open on almost every pass play. Wally said that if his poor little boys down in Georgia did it, he couldn't understand why a bunch of All-Stars couldn't. We did, and we beat the pros."

Butts points out quite truthfully and without the slightest hint of modesty that Georgia's three great All-American backs, Sinkwich, Trippi and Rauch, all were fine passers when they left Athens, but none was a good passer when he first enrolled.

Ed Danforth, sports editor of the Atlanta Journal, discussing this fact, says, "Sinkwich couldn't even throw

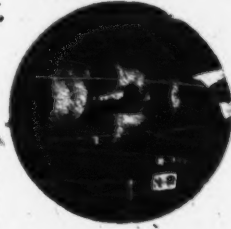
30



What kind of man is STALIN?

IS Joseph Stalin a ruthless dictator—or merely "good old Joe," a prisoner of his Politburo comrades? Does he mean what he says about Russia's plans—or is he bent on Sovietizing the world? Can we come to a working understanding with him—or must millions continue to fear the oft-threatened "frightful collision" between Soviet Russia and the capitalist world?

There is probably no living American who, by face-to-face contact with Stalin, is better qualified to answer these questions than Lt. Gen. Walter Bedell Smith, former United States Ambassador to Russia. General Smith has written the inside story of his experiences during his three years in Moscow. This extraordinary personal document—which will appear exclusively, in this country, in The Saturday Evening Post and The New York Times—will be presented to Post readers in a series of eight articles. In the first of these, General Smith tells the story of a historic, two-hour talk with Stalin. Watch for this remarkable feature



Walter Bedell Smith

in next week's POST

a spiral. Bill Hartman, the backfield coach, and Butts labored long to develop his ability to pass. What I think finally spurred him on to becoming the finest passer in the South was the fact that the opposition was playing practically an eight-man line against him in every game.

"About Trippi, he had more natural ability than the other two. He could throw mechanically, but he was not naturally talented at picking out pass receivers. When Trippi first came to Athens, he threw with his weight improperly distributed, and he threw a ball that was difficult to catch.

"But, to my mind, Rauch is the crowning achievement of the intensive coaching by Butts. John came to Georgia as a runner and had never played the T formation. Wally was suffering a wartime shortage of material and decided that Rauch was the best quarterback prospect. Then he worked daily all summer in 1945 to develop Rauch into a passer. John became the finest passer in the Southeastern Conference last year."

The boys, none of whom had been sizing high-school stars, agree with Danforth.

"I owe everything I accomplished in football, and a lot more, to Coach Butts," Sipkwich declares. "I had to learn the hard way"—Sinkwich once went on strike against practicing daily—but he taught me to become part of a team. He and Bill Hartman taught me to pass. I never would have been effective as a runner if I had not learned to throw."

Sinkwich was paid \$20,000 for his first season with the Detroit Lions and became the most valuable player in the National Professional League in 1944.

Trippi is even more emphatic. "Coach Butts is such a perfectionist that he would improve any boy," Charley says. "He alone made me an All-American.

People ask why I returned to Georgia instead of entering pro football when I was discharged from the Army. I know what many of them think—that Trippi was rewarded handsomely by Georgia alumni—but I shook hands with Coach Butts in his office the day I left to enter the service and I told him then that I would come back and play for him if he needed me, even if I was in the Army ten years. If it hadn't been for Georgia and Coach Butts, I never would have had a chance at an education . . . and the opportunity to play college or pro football."

Trippi signed a four-year contract with the Chicago Cardinals, calling for \$100,000. In the spring, he coaches the Georgia baseball team.

Rauch, who is now in his first pro season with the New York Bulldogs, says, "Coach Butts spent more time with me individually than most coaches spend with entire squads. He taught me the T offense and he taught me how to pass. I'm grateful that I was picked on some All-American teams, but they should have picked Coach Butts."

Butts draws criticism from some sources—mostly supporters of rival teams—for bringing in so many boys from the North. His stock answer to such talk is, "I don't care where the boy comes from, how he spells his name or whether he is Croatian or an Australian. All I ask is that he be loyal to Georgia, be proud of that red jersey, and try like hell to get the ball over the goal line."

The mass migration of Northern athletes to Georgia dates from 1939. Since Sinkwich and Poachner, there have been few Georgia freshman teams with-

out a boy from the Youngstown, Ohio, neighborhood. Contacts through these boys and their coaches naturally have led enterprising Georgia talent scouts to other Ohio towns.

Pennsylvania boys started heading to Athens at the behest of the late Harold Ketron, a Georgia alumnus who owned a soft-drink bottling plant at Wilkes-Barre. A former Bulldog football player, Ketron met and admired Coach Butts. So he began to scout high-school prospects in the Wyoming Valley, one of the nation's richest beds of football talent. Trippi, George Young, Andy Dudish, Joe Tereshinski and several others were the trail blazers Ketron sent down as the Bulldogs established a coal-country beseeched.

This year, however, Georgia's freshman team includes twenty native sons. "Northern high-school boys usually are older and therefore stronger and more mature," Butts says, "but the improved high-school coaching in Georgia and the establishment of a full four-year course in all Georgia high schools have strengthened football in the state. There are more fine prospects coming up this year than ever before. It will not be long before our squad can be composed almost entirely of Georgia boys."

Butts, whose four principles of winning football are, in the order of their importance, discipline, conditioning, fundamentals, and pass patterns, is definitely a two-sided personality. Away from football, he is a quiet person whose rare speech is heard in a soft drawl. Despite his strength, his handshake is firm only when compared to a wet shaving brush. He uses no profanity, refuses to touch a cigarette, and imbibes only to the extent of an occasional social drink. His eyesight is poor, but he complains that he does not have time to have glasses properly fitted. Today he's still using a pair that he borrowed last summer from a friend in Chicago to read a menu. He forgets where he last deposited his raincoat, perhaps it was San Francisco, and he buys from four to six hats each year because he cannot remember where the last one is parked.

"Such absent-mindedness vanishes at the drop of a halfback. Wally cannot sleep during the football season. He drives himself, as he does his players, to the verge of, but never over, the breaking point. He has student managers keep a record of every play used in scrimmages. Then he memorizes this information to determine which halfback runs which play best, after what sequence a particular play is most effective, and which defensive man makes the tackles on each play. He also insists on regular time trials for the players to see if any have gained or lost speed.

Grades of every member of the varsity and freshman squads are checked periodically, and he orders tutors for those who lag behind in the classrooms. His players must weigh daily before and after practice. He frequently prescribes lighter practice-field work and more milk for a player he thinks needs more pounds. All the single players live in one dormitory, and their specially prepared menus are checked by Wally.

Butts is aggressively independent in seeing that his athletes get the best keep. When overcrowded dormitories threatened to bring a university regulation of four boys to a room, Wally objected strenuously, announcing that if necessary he would install the football players in Athens hotels. This prompted a student to quip, "Why

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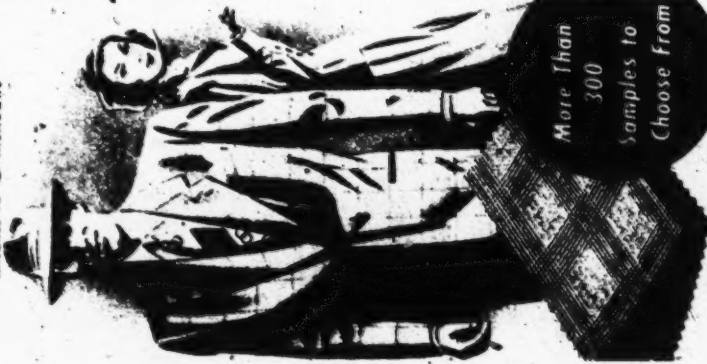
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THE SATURDAY EVENING POST

November 5, 1949

doesn't the university get up a football team of its own and play the athletic association some Saturday? They would beat us, but it would be interesting." Some players who have served under Butts declare that their love of football was killed by the driving pace at Athens. One ex-Bulldog says, "He is not patient enough with young boys. Too much skull busting goes on. He has made stars out of mediocre high-school players. I'll admit, but I think he has ruined many others by driving them too hard and making them quit. I quit because I didn't get any pleasure out of football."

Probably the most consternation Butts ever caused among his players was when he broke into tears following the Georgia team's great second-half comeback to beat Alabama, 21-10, in 1942. One of the Northern boys on the squad later described it as "the most unbelievable thing I ever saw. It was like watching one of these Confederate monuments weep."

Such a forceful, demanding, dedicated person as Butts is either loathed or loved. On his 1941 team, Frank Sinkwich played, wearing a mask to protect a fractured jaw, and George Pochner with a broken arm in a cast covered with soft rubber. In a later season, Johnny Rauch was to wear a mask to shield a shattered cheekbone. All three begged to play.

Georgia football players are allowed no drinking water during practice or games. When there are substitutions, the men must sprint on and off the field. Nor do Georgia teams sit or sprawl on the ground during time-outs. They stand erect.

In Wally's first season as head coach in 1939, Georgia lost to N.Y.U., 14-13. That set Butts to thinking about extra-point specialists. Since then, the Bulldogs have never lost a game through inability to convert. They have won three by such a margin and tied two. "Too much is at stake on that extra point," Butts says. "We try to develop a boy who does nothing else. We don't want to risk him to injury by playing him during the regular game."

Leo Costa did play twenty-eight seconds in his opening game as a sophomore in 1940, but after that he did nothing but kick extra points. Since time is out when the conversion is tried, Costa finished his career in the Rose Bowl with a total of only twenty-eight seconds' official playing time. Yet he had scored in every game Georgia had played for three years, since no team ever kept Sinkwich and Company from scoring at least one touchdown.

Coach Whitworth, who once kicked an Alabama field goal in the Rose Bowl, is the extra-point instructor. To cure the kicker from watching the flight of the ball, much as a golfer raises his head to watch a drive, Whitworth makes the specialists pick up blades of grass before they look up. Costa always contended that he never saw one of his kicks split the uprights. By the end of the season there is a bare spot in front of each goal post at Athens, where Georgia kickers snatch up the grass after each boot, practice or game.

Billy Bryan kicked twenty-nine conversions in 1944. Then came George Jernigan, the Springfield, Tennessee, rifle. Jernigan was the conference's fourth-leading scorer in 1946 with a record number of conversions, forty-seven. He missed only five. The year before, he kicked thirty-seven out of forty-four.

Whitworth didn't come up with a specialist in 1947 and 1948. Joe Geri,

his best kicker, was also one of the best ball carriers. Geri kicked twenty-four out of twenty-eight two years ago, and last season was the S.E.C.'s highest scorer with thirty-six extra points in forty attempts, plus nine touchdowns. This year Butts and Whitworth have another boy who does nothing for his bread and butter but sock that extra point. His name is Wayne Haskins, a 136-pound Lewistown, Tennessee, sophomore whose right arm was permanently damaged in a hunting accident. Butts, who is extra sympathetic to any crippled person, because his youngest daughter Nancy once suffered paralysis, gave Haskins a scholarship. At first the boy only knew how to kick wearing G.I. shoes.

"He'll make it," Coach Whitworth emphasizes. "He's a game little rascal and he's finally got used to those shoes with the cleats."

Butts' daughter Nancy is twelve. He is the father of two other girls, Winifred Faye, nineteen, and Martha Jean, seventeen. "They all look like their mother, thank goodness," he exclaims. Mrs. Butts is the former Winifred Faye Taylor, a home-town girl whom Wally married in 1929.

Most football fans, including hundreds of rabid Georgia alumni, see Wally only when he is on the banquet circuit or at civic-club meetings. Here he is a showman. He wails about poor Georgia's inferior material, brags about the fine players other schools are getting; then, after this bit of sabotage, tells delightful stories.

"Sinkwich never would have done anything without my coaching," he lulls his listeners. "Why, in 1941 he ran the same play wrong three times against Florida. I yanked him out of there, gave him the devil and told him what he was doing wrong. Then I let him go back in there. On the first play he ran for a touchdown. That's what great coaching will do." Before the crowd can react to such shameless egotism, Butts adds, "Oh, yes, that's what great coaching will do. He ran the darn play wrong again. But he scored."

Wally Butts is a controversial and a contradictory figure. He has on three occasions kicked outstanding players off the squad for smoking, then turned around and restored their scholarships

in order that they might finish their education. But they never played another minute of football. In one such case of a war veteran, Butts attempted to sell the press the idea that the boy had quit football because of ulcers. The boy spilled the beans.

Wally's first contract at Georgia has never expired. The athletic board keeps adding years and dollars to his original pact, and he now has ten seasons to go at what is estimated to be a salary of \$17,500. He will, of course, say the figure is much lower.

Butts never misses an opportunity to low-rate his prospects, as he did in 1946 when the Washington Touchdown Club honored him and Trippi. Gen. Maxwell D. Taylor, then West Point superintendent, told the Washington audience that football would be de-emphasized at Army.

When Butts arose to speak, he turned to General Taylor and said, "I don't blame you, general. If I had lost Blanchard, Davis and Tucker, I'd de-emphasize football too. In fact I am just losing Trippi, and I think Georgia might be better off to quit entirely."

Nobody expects Butts to change his ways. He will continue, during the progress of a game, to chew grass, moan when a player drops a pass, throw his arms heavenward when the quarterback calls the wrong play, and frantically wave on the ball carrier when he breaks into the open field.

His players will be disciplined to the point of permanence. Spec Landrum, now an assistant coach at Atlanta's Roosevelt High, tells how indelible an impression Butts makes on his players. "Allen Bloodworth played for Coach Butts at Georgia Military," Spec relates. "Bloodworth later played for Mercer, then became a businessman at Macon. One day he saw Coach Butts walk onto the practice field at Mercer. Coach Butts then was at Georgia and had absolutely no connection in any way with Bloodworth. But when he saw Butts, Bloodworth quickly ground out his cigarette."

Later joked about it, Bloodworth said, "I knew Coach Butts wasn't in charge of me any more, but I had been one of his boys and I was afraid that he might think he was still in charge. I'd never smoke in front of him."

THE END



MORRIS

"Darn! Just when I get situated, they call the half."

THE SATURDAY EVENING POST

[fol. 1403]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT No. 26

October 22, 1962

Mr. J. D. Bolton
Academic Building
The University of Georgia
Campus

Dear J. D.:

I enjoyed riding to the game with you and Kathryn.

By way of explanation, I did not get back to your car because I was sick at the game—a nervous stomach or something related. Red Leathers came by the press box, to see Harry Mehre and I caught a ride with him.

I was sorry I did not make a better contribution to recruiting but did not feel up to the occasion.

I was sorry about the game. Our first drive was great to watch. The Bulldogs will be alright if all of us "Keep the faith".

Sincerely,

Wallace Butts
Director of Athletics

WB:dm

1068

[fol. 1404]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT No. 27

April 27, 1962

Mr. J. D. Bolton
Academic Building
The University of Georgia
Campus

Dear J. D.:

I think it an unfair deal for you to turn down my expense account to General Neyland's funeral.

He is one of the outstanding men developed in the Southeastern Conference. If I had not gone to the funeral, Johnny had planned to send two members of the coaching staff and their expenses would have been paid by the University of Georgia.

Sincerely,

Wallace Butts
Athletic Director

WB:dm

[fol. 1405]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT No. 28

October 22, 1962

Coach Johnny Griffith
Head Football Coach
The University of Georgia
Campus

Dear Johnny:

I had to leave today (Sunday) for Hattiesburg, Mississippi. I am sorry I did not see you.

Do not worry too much—everything will be alright.

Our first drive was great.

Sincerely,

Wallace Butts
Director of Athletics

WB:dm

1070

[fol. 1406]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT No. 29

February 26, 1963

Coach Johnny Griffith
Head Football Coach
The University of Georgia
Campus

Dear Johnny:

I hope you have a great year in football. You and your staff deserve the good breaks and I hope "the ball will bounce the right way for you".

Sincerely,

Wallace Butts

WB:dm

GEORGIA VERSUS ALABAMA

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THE STORY OF A COLLEGE FOOTBALL FIX

A SHOCKING REPORT

OF HOW WALLY BUTTS AND

"BEAR" BRYANT RIGGED

A GAME LAST FALL

By FRANK GRAHAM JR.

80

IN UNITED STATES DISTRICT COURT
DEFENDANT'S EXHIBIT No. 4

[fol. 1407]

1071

Not since the Chicago White Sox threw the 1919 World Series has there been a sports story as shocking as this one. This is the story of one fixed game of college football.

Before the University of Georgia played the University of Alabama last September 22, Wally Butts, athletic director of Georgia, gave Paul (Bear) Bryant, head coach of Alabama, Georgia's plays, defensive patterns, all the significant secrets Georgia's football team possessed.

The corrupt here were not professional ball players, gone wrong, as in the 1919 Black Sox scandal. The corrupt were not disreputable gamblers as in the scandals continually afflicting college basketball. The corrupt were two men Butts and Bryant employed to educate and to guide young men.

How prevalent is the fixing of college football games? How often do teachers sell out their pupils? We don't know yet. For now we can only be appalled. THE EDITORS



On their knees, Alabama cheerleaders plead for touchdown. Team scored five.

On Friday morning, September 14, 1962, an insurance salesman in Atlanta, Georgia, named George Burnett picked up his telephone and dialed the number of a local public-relations firm. The number was Jackson 5-3536. The line was busy, but Burnett kept trying. On the fourth or fifth attempt he had just dialed the final number when he heard what he later described as "a series of harsh electronic sounds," then the voice of a telephone operator said:

"Coach Bryant is out on the field, but he'll come to the phone. Do you want to hold, Coach Butts, or shall we call you back?"

And then a man's voice: "I'll hold, operator."

Like most males over the age of four in Atlanta, George Burnett is a football fan. He realized that he had been hooked by accident into a long-distance circuit and that he was about to overhear a conversation between two of the colossi of Southern football. Paul (Bear) Bryant is the head coach and athletic director of the University of Alabama, and Wallace "Wally" Butts was, for 22 years the head coach of the University of Georgia and, at the time of this conversation, the university's athletic director. Burnett ("I was curious, naturally") kept the phone to his ear. Through this almost incredible coincidence he was to make the most important interception in modern football history.

After a brief wait Burnett heard the operator say that Coach Bryant was on the phone and ready to speak to Coach Butts.

"Hello, Bear," Butts said.

"Hello, Wally. Do you have anything for me?"

As Burnett listened, Butts began to give Bryant detailed information about the plays and formations Georgia would use in its opening game eight days later.

Georgia's opponent was to be Alabama. Butts outlined Georgia's offensive plays for Bryant and told him how Georgia planned to defend against Alabama's attack. Butts mentioned both players and plays by name. Occasionally Bryant asked Butts about specific offensive or defensive maneuvers, and Butts either answered in detail or said, "I don't know about that. I'll have to find out."

"One question Bryant asked," Burnett recalled later, "was 'How about quick kicks?' And Butts said, 'Don't worry about quick kicks. They don't have any one who can do it.'"

Butts also said that Rakestraw (Georgia quarterback Larry Rakestraw) tipped off what he was going to do by the way he held his feet. If one foot was behind the other it meant he would drop back to pass. If they were together it meant he was setting himself to spin and hand off. And another thing he told Bryant was that Woodward (Brigham Woodward, a defensive back) committed himself fast on pass defense.

As the conversation ended, Bryant asked Butts if he would be at home on Sunday. Butts answered that he would.

"Fine," Bryant said. "I'll call you there Sunday."

Listening to this amazing conversation, Burnett began to make notes on a scratch pad, he kept on his desk. Some of the names were strange to him—tackle Ray Rismiller's name he jotted down as "Rice Miller," and end Mickey Babb's as "Baer"—and some of the jargon stranger still, but he recorded all that he heard. When the two men had hung up Burnett

still sat at his desk, stunned, and a little bit frightened.

Suddenly he heard an operator's voice: "Have you completed your call, sir?"

Burnett started. "Yes, operator. By the way, can you give me the number I was connected with?"

The operator supplied him with a number in Tuscaloosa, Alabama, which he later identified as that of the University of Alabama. The extension was that of the athletic department. Burnett then dialed Jackson 5-3536—the number he originally wanted. This time the call went through normally, and he reached a close friend and former business associate named Milton Flack.

"Is Wally Butts in your office now, Milt?" Burnett asked.

"Well, he's in the back office—making a phone call, I think. Here he comes now."

"Don't mention that I asked about him," Burnett said hurriedly. "I'll talk to you later."

Through some curious electronic confusion, George Burnett, calling his friend Milt Flack, had hooked into the call Wally Butts was making from a rear office in Flack's suite. He was the third man, the odd man. But he was not out.

Putting the pieces together

In the next few hours Burnett tried to piece together what he knew of Georgia football. Butts, a native of Milledgeville, Georgia, had joined the university coaching staff as an assistant in 1938. A year later he was named head coach. For 20 years he was one of the most popular and successful coaches in the South. Then prominent University of Georgia alumni abruptly soured on him, and on January 6, 1961, he was replaced by a young assistant coach named Johnny Griffith. Butts, fired away in the position of Georgia's athletic director (which he had held along with his coaching job for some years), was outspokenly bitter about his removal from the field.

Burnett knew, too, that Butts recently had been involved in a disastrous speculation in Florida orange groves. Butts had lost over \$70,000 because, as someone put it, "you couldn't grow cactus on that land." One of his partners in the deal was also an associate of Milt Flack at a public-relations firm called Communications International, the office Burnett had been trying to call when he hooked into the Butts-Bryant conversation.

That afternoon Burnett told Flack what he had overheard. Both of them, though only slightly acquainted with the high-spirited, gregarious Butts, liked him, and they decided to forget the whole thing. Burnett went home in the evening and stuffed his notes away in a bureau drawer. He felt a great sense of relief. The matter, as far as he was concerned, was closed.

Eight days later, on September 22, the Georgia team traveled to Birmingham to play Alabama before a crowd of 54,000 people at Legion Field. Alabama hardly needed any "inside" information to handle the outmanned Bulldogs. Bryant, one of the country's most efficient and most ruthless coaches—he likes his players to be mean, and once wrote that football games are won by "outmeaning" the other team—had built a powerhouse that was in the middle of a 26-game winning streak. Alabama was the defending national champion, combining a fast-charging and savage-tackling defense with an effective

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attack built around a sensational sophomore quarterback named Joe Namath. The Georgia team was composed chiefly of unsensational sophomores.

Various betting lines showed Alabama favored by from 14 to 17 points. If a man were to bet on Alabama he would want to be pretty sure that his team could win by more than 17 points, a very uncertain wager when two major colleges are opening the season together and supposedly have no reliable line on the other's strengths and weaknesses.

Bryant, before the game, certainly did not talk to the press like a man who was playing with a stacked deck.

"The only chance we've got against Georgia is by scratching and battling for our life," he said, managing to keep a straight face. "Put that down so you can look at it next week and see how right it is."

The game itself would have been enjoyed most by a man who gets kicks from attending executions. Coach Bryant (he neglected to wear a black hood) snapped every trap. The first time Rakestraw passed, Alabama intercepted. Then Alabama quickly scored on a 52-yard pass play of its own. The Georgia players, their moves analyzed and forecast like those of rats in a maze, took a frightful physical beating.

"The Georgia backfield never got out of its backfield," one spectator said afterward. And reporter Jesse Outlar wrote in Atlanta's Sunday Journal the following day: "Every time Rakestraw got the ball he was surrounded by Alabama's All-American center Lee Roy Jordan and his eager playmates."

Georgia made only 37 yards rushing, completed only 7 of 19 passes for 79 yards, and made its deepest penetration (to Alabama's 41-yard line) on the next to the last play of the game. Georgia could do nothing right, and Alabama nothing wrong. The final score was 35-0, the most lopsided score between the two teams since 1923.

It was a bitter defeat for Georgia's promising young team. The 38-year-old Johnny Griffith, who was beginning his second season as head coach, was stunned. Asked about the game by reporter Jim Minter, he said: "I figured Alabama was about three touchdowns better than we were. So that leaves about fifteen points we can explain only by saying we didn't play any football."

Quarterback Rakestraw came even closer to the truth. "They were just so quick and mobile," he told Minter. "They seemed to know every play we were going to run."

Later other members of the Georgia squad expressed their misgivings to Furman Bisher, sports editor of the Atlanta Journal. "The Alabama players taunted us," end Mickey Babb told him. "You can't run *Eighty-eight Pop* [a key Georgia play] on us," they'd yell. They knew just what we were going to run, and just what we called it."

And Sam Richwine, the squad's trainer, told Bisher: "They played just like they knew what we were going to do. And it seemed to me a lot like things were when they played us in 1961 too." (Alabama walloped Georgia in 1961 by a score of 32-6.)

Only one man in the Georgia camp did not despair that day. Asked by reporter

George Burnett of Atlanta: *He overheard critical long-distance call.*



Wally Butts, former athletic director of Georgia: He gave away Georgia plays, defense patterns.



Head coach Paul (Bear) Bryant of Alabama. He took plays for his defending national champions.



THE FOOTBALL FIX



Solemnly Wally Butts leads a Georgia football team in locker-room prayer.

John Logue about Georgia's disappointing performance, ex-coach Wally Butts nodded wisely and set him straight. "Potential is the word for what I saw," he said. "Unlimited potential."

The whole matter weighed heavily on George Burnett. He began to wonder if he had done the right thing when he had put the notes aside and kept his mouth shut. Now 41 years old, he was still struggling to support his large family. Among his five children were a couple of boys who played football. "How would I feel," Burnett asked himself, "if my boys were going out on the field to have their heads banged in by a stronger team, and then I discovered they'd been sold out?" He began to wake up at night and lie there in the dark, thinking about it.

In one sense Burnett knew it would be easiest to keep the notes in the drawer. While every citizen is encouraged to report a crime to authorities, the penalties against the man who talks are often more severe than those against the culprit. Burnett wasn't worried about physical retaliation. But there might be social and economic ones. Football is almost a religion in the South; the big-name coaches there are minor deities.

Butts no longer had his old-time stature, but many people were still intensely loyal to him (and he was a director of the small Atlanta insurance agency where Burnett worked). Bear Bryant was a national figure who had made impressive records at Texas A&M and Kentucky, and had more recently transformed Alabama from pushovers to national champions.

Burnett, protective toward his family, fearful of challenging deities, was troubled by a drive to do what was right. But what was right? To talk? To create furor, perhaps even national scandal? Or should he remain silent, ignoring wrong? That was a safe course, but one that might sit heavily on his conscience for all the rest of his days.

Living in his private misery, he thought about his past. Burnett himself had played high-school football in San Antonio, Texas, where he was born. During World War II he became a group navigator aboard a Martin B-26. On January 14, 1945, when his plane was shot down over Saint-Vith, Belgium, he was the only survivor. He lost part of his left hand, and spent the rest of the war in a German prison camp. Articulate and personable, he was now the division manager of the insurance agency.

On January 4 of this year he sat in his office with Bob Edwards, a longtime friend who was also an employee of the agency. Burnett knew that Edwards had played football with Johnny Griffith at South Georgia, a junior college.

"You know, Bob," Burnett said, after they had talked business for a while, "there's something that's been eating me up for a long while. I was going to tell you about it at the time, and then I decided to keep quiet. But I think you should know this, being a friend of Johnny Griffith."

After Edwards heard the story of the phone call, he asked if he could report it to Griffith. Burnett, still reluctant to get seriously involved, told Edwards to go

ahead but to try to keep his name out of it. Powerful men in Georgia might defend if Wally Butts was hurt, and Burnett did not want to jeopardize his own career just when things were beginning to break nicely for him.

But like so many others, Burnett found that there is no such thing as a little involvement. Griffith pressed to meet him, and nervously Burnett agreed. In the middle of January he met with Edwards and Griffith in the Georgia coach's room at Atlanta's Baltimore Hotel. Simultaneously a general meeting of the Southeastern Conference coaches was taking place at the Baltimore.

The Georgia-Alabama game had been forgotten by most of the coaches and athletic officials present. A popular topic of conversation was a late-season game between Alabama and Georgia Tech, in which Bryant's long winning streak had been broken.

Alabama, a five-point favorite, had trailed 7-6 with only a little more than a minute to play. Then Alabama made a first down on the Georgia Tech 14-yard line. Since Bryant had a competent field goal kicker, the classic strategy would have been to pound away at the middle of

Tech's line, keeping the ball between the goalposts and, on third or fourth down, order a field-goal try. (Alabama had defeated Georgia Tech on a last-minute field goal in 1961.) Instead, Bryant's quarterback passed on first down. The pass was intercepted, and Georgia Tech held the ball during the game's waning seconds, thus scoring last season's greatest upset.

During the January conference at the Baltimore, Bryant was frequently kidded about that first-down pass.

Away from the bars and the crowds, in Griffith's room the talk was only of Georgia-Alabama. Griffith listened grimly to Burnett's story, then read his notes. Suddenly he looked up.

"I didn't believe you until just this minute," he told Burnett. "But here something in your notes that you couldn't possibly have dreamed up... this thing about our pass patterns. I took this over from Wally Butts when I became coach, and I gave it a different name. Nobody uses the old name for this pattern but one man. Wally Butts."

Suspensions confirmed

Griffith finished reading the notes, then asked Burnett if he could keep them. Burnett nodded.

"We knew somebody'd given our plays to Alabama," Griffith told him, "and maybe to a couple of other teams we played too. But we had no idea it was Wally Butts. You know, during the first half of the Alabama game my players kept coming to the sidelines and saying, 'Coach, we been sold out. Their line-backers are hollering out our plays while we're still calling the signals.'"

Griffith has since spoken of his feelings when he had finished reading Burnett's notes, and Burnett and Edwards had left. "I don't think I moved for an hour—thinking what I should do. Then I realized I didn't have any choice."

Griffith went to university officials, told them what he knew and said that he would resign if Butts was permitted to

Downcast coach Griffith slouches near bench as Georgia team is slaughtered.



Head coach Johnny Griffith of Georgia's beaten Bulldogs: "I never had a chance."

remain in his job. On January 28 a report reached the newspapers that Butts had resigned. At first it was denied by Butts and the university. A few days later it was confirmed with the additional news—that Butts would remain as athletic director until June 1 so that he could qualify for certain pension benefits. Rumors flooded Atlanta. One of the wildest was that Butts was mysteriously and suddenly ill and had entered the state hospital at Athens. This was quickly scotched when Georgia University officials maintained that Butts merely went for the physical checkup required for his pension records. Shortly afterward he was seen in Atlanta at a Georgia Tech basketball game.

But if Butts was seen publicly, events involving him remained closely guarded secrets. Burnett was asked to come to the Atlanta office of M. Cook Barwick, an attorney representing the University of Georgia. There he met Dr. O. C. Aderhold, the university president. Burnett's story was carefully checked. He then agreed to take a lie-detector test, which was administered by polygraph expert Sidney McMain, in the Atlanta Federal building. Burnett passed the test to everybody's satisfaction.

Phone-company check

Next an official of the Southern Bell Telephone Company checked and found that a call had been made from the office of Communications International to the University of Alabama extension noted by Burnett on his scratch pad. This information corroborated Burnett's statement that the call had been made at about 10:25 in the morning and had lasted 15 or 16 minutes.

"I jotted down the time when the call was completed," Burnett said. "It was 10:40. This is an old navigator's habit, I guess. For instance, I know that I was shot down over Saint-Vith at exactly 10:21, because when the bombardier called 'Bombs away!' I looked at my watch and wrote down the time. A few seconds later we got hit."

University officials still nursed reservations about Burnett's story because of the fantastic coincidence that had enabled him to overhear Butts's call. Then, during one of the many conferences he attended in attorney Barwick's office in the Rhodes-Haverty Building, a second coincidence, equally odd, cleared the air: Barwick placed a call to Doctor Aderhold at the university. Suddenly, Barwick and Aderhold found themselves somehow braided into a four-way conversation with two unknown female voices. The two men burst into nervous laughter. Burnett's story gained a little more credence.

February 21 was a painful day for George Burnett. He was summoned once more to Barwick's office, because Bernie Moore, the commissioner of the Southern Conference, "wanted to ask some questions." On Burnett's arrival he found not only Moore but Doctor Aderhold, two members of the university's board of regents, and another man identified as Bill Hartman, a friend of Wally Butts.

From the start, Burnett sensed a mood of hostility in the air. The ball was carried by one of the members of the Georgia board of regents, who confronted Burnett

with a report that he had been arrested two years before for writing bad checks and that he was still on probation when he overheard the conversation between Butts and Bryant.

"Is there anything else in your past you're trying to cover up?" the regents official demanded.

Burnett was frightened and angry. "I didn't realize that I was on trial," he said. He went on to say that he had nothing to hide, that he had given university officials permission to look into his background, and that he had taken a lie-detector test, signed an affidavit that his testimony was true and permitted his statements to be recorded on tape. His notes had been taken from him and placed by Barwick in the safety-deposit vault of an Atlanta bank.

"I was arrested on a bad-check charge," Burnett admitted. "I was way behind on my bills and two of the checks I wrote—one was for twenty-five dollars and the other for twenty dollars—bounced. I was fined one hundred dollars and put on probation for a year. I think that anybody who is fair will find I got into trouble because I've always had trouble handling my financial affairs and not because I acted with criminal intent."

Burnett was shaken by this meeting. He felt that he had been candid with the university but that he had also angered many friends of Wally Butts. He signed a paper at the officials' request which gave the university permission to have his war records opened and examined. He cared about his reputation. He was proud to have been a navigator.

"Doctor Aderhold was always very kind to me at those meetings," Burnett said later, "but I didn't like the attitude of some of the others. I began to feel that I'd be hurt when and if these people decided to make this mess public. That's when I went to my lawyer, and we agreed that I should tell my story to *The Saturday Evening Post*."

Now the net closed on Wally Butts. On February 23 the University of Georgia's athletic board met hastily in Atlanta and confronted Butts with Burnett's testimony. Challenged, Butts refused to take a lie-detector test. The next day's newspapers reported that he had submitted his resignation, effective immediately, "for purely personal and business purposes."

"I still think I'm able to coach a little," Butts told a reporter that day, "and I feel I can help a pro team."

The chances are that Wally Butts will never help any football team again. Bear Bryant may well follow him into oblivion—a special hell for that grim extrovert—for in a very real sense he betrayed the boys he was pledged to lead. The investigation by university and Southern Conference officials is continuing; motion pictures of other games are being scrutinized; where it will end no one so far can say. But careers will be ruined, that is sure. A great sport will be permanently damaged. For many people the bloom must pass forever from college football.

"I never had a chance, did I?" Coach Johnny Griffith said bitterly to a friend the other day. "I never had a chance."

When a fixer-works against you, that's the way he likes it.

THE END



Butts and Bryant meet as friends, exchange warm greetings before the Georgia-Alabama game at Legion Field, Birmingham, Alabama, in 1960.

[fol. 1411]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S EXHIBIT No. 11

April 2, 1963

I, M. H. Blackshear, Jr., Deputy Comptroller General, hereby certify that the attached document is a true and correct copy of an original document on file in the Office of the Comptroller General, Ex Officio Industrial Loan Commissioner, this 2nd day of April, 1963.

(Signed) M. H. BLACKSHEAR, JR.

Wallace Butts
Statement of Financial Position
July 17, 1961

ASSETS

Cash on Hand and in Bank	4,825.00
Marketable Securities	52,662.00 (1)
Real Estate (2 houses and 3 lots)	20,000.00
Investments in Closely Held Corporations	93,500.00 (2)
Residence and Furniture	90,000.00 (3)
Automobiles	8,300.00 (3)
Cash Surrender Values of Life Insurance (Approx.)	<u>80,000.00</u>
Total Assets	<u>249,287.00</u>

LIABILITIES AND NET WORTH

Liabilities:	
Notes Payable - National Bank of Athens	34,500.00
Notes Payable - Citizens & Southern National Bank	6,799.00
Notes Payable - Bank of Gray	7,500.00
Loans Against Cash Surrender Values of Life Insurance	65,000.00
Mortgage Payable - Residence	13,500.00
Note Payable - First National Bank and Trust Co.	<u>16,000.00</u>
	143,299.00
Net Worth:	
Wallace Butts, Net Worth	<u>205,988.00</u>
Total Liabilities and Net Worth	<u>249,287.00</u>

(1) Includes 7,000 shares of Continental Enterprises Stock, and 1,300 shares of Georgia International Life Ins. Co. Stock

(2) Orange River Groves, Inc. - \$78,500.00 (Notes Receivable and Stock)
Hollywood Estates, Inc. - 15,000.00

\$93,500.00

(3) Fair Market Values

Prepared From Information Furnished:

Wallace Butts

Wallace Butts

Thomas L. Williams, CPA

Thomas L. Williams, Certified Public Accountant



~~Paul Dretz~~

Bear - Bryant

Wally - Butts

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Long Count

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Motion

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Baer on a Hook
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Rt half Back on Fly -
Lt. Half Back

B. B. Gives to L.H.
L.G. Pulling Blocks on
Corner -

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till Goal Line

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Fly
Screen to him

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Baer catches Everything
they Throw

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OFFICE

GA. → DROP END OFF
contain with Tackle
(Defense)

LT End out 1591b
Slot Rt

[fol. 1415]

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[fol. 1418]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S EXHIBIT No. 19

Athens, Georgia
March 26, 1963Mr. James H. Therrell
Assistant Attorney General
For the State of Georgia

After viewing the alleged notations made by George Burnett while listening to an alleged telephone conversation between Wallace Butts and Bear Bryant on September 13, 1962, it is my opinion, as one of the coaches of the University of Georgia football team, that if such information was given to Coach Bryant before the opening game of the season, it conveyed vital and important information with respect to the offensive and defensive plays, patterns and formations that could have been of value to the University of Alabama football team and could have affected the outcome of the game on September 22, 1962.

(Signed) JOHN W. GREGORY
John W. Gregory

[fol. 1419]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S EXHIBIT No. 20

Athens, Georgia

February 23, 1963

Dr. O. C. Aderhold, President
The University of Georgia
Chairman of the Athletic Board

Dear Dr. Aderhold:

During the past two years, I have developed business interests. I find that I am having to devote more time to these interests. It is for this reason that I submit my resignation as Athletic Director of the University of Georgia, effective February 29, 1963.

I am grateful to you and the members of the Athletic Board for your cooperation through the years.

Yours very truly,

(Signed) WALLACE BUTTS
Wallace Butts
Athletic Director

[fol. 1420]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S EXHIBIT No. 21

UNIVERSITY OF ALABAMA

UNIVERSITY, ALABAMA

Office of the
President

March 6, 1963

Dr. O. C. Aderhold, President
The University of Georgia
Athens, Georgia

Confidential

Dear Dr. Aderhold:

I have spent a great deal of time investigating thoroughly the questions that were raised during our meeting in Birmingham and have talked with Coach Bryant at least on two occasions. As best as I can ascertain, this is the information that I have received.

Coach Butts has been serving on the football rules committee, and at a meeting held last summer the Rules Committee the defenses used by Coach Bryant, L.S.U. and Tennessee were discussed at length and new rules were drawn up that would severely penalize these three teams unless the defenses were changes, particularly on certain plays.

Coach Butts had discussed this with Coach Bryant and the two were together at some meeting where Coach Butts told Coach Bryant that the University of Georgia had plays that would severely penalize the Alabama team and not only would cause LeRoy Jordan, an Alabama player, to be [fol. 1421] expelled from the game, but could severely injure one of the offensive players on the Georgia team.

Coach Bryant asked Coach Butts to let him know what the plays were, and on September 14 he called Coach Bryant and told him. There was a question about another one of the offensive plays of the Georgia team that could seriously penalize the Alabama team and bring on additional injury to a player. Coach Bryant asked Coach Butts to check on that play, which he did, and called back on September 16.

It was then that Coach Bryant changed his defenses and invited Mr. George Gardner, Head of the Officials of the Southeastern Conference, to come to Tuscaloosa and interpret for him the legality of his defenses. This Mr. Gardner did the following week. The defenses were changed and Coach Bryant was grateful to Coach Butts for calling this to his attention.

Coach Bryant informs me that calling this to his attention may have favored the University of Alabama football team, but that he doubts it seriously. He did say that it prevented him from using illegal plays after the new change of rules.

I have checked into other matters that were discussed and can find no grounds for Mr. Bisher's accusations, and as I understand it he has now decided for lack of information to drop the matter.

Dr. Aderhold, this continues to be a serious matter with me, and if you have any additional information I would appreciate your furnishing me with it as I am not only anxious to work with you but to satisfy my own mind.

[fol. 1422] Thanking you for coming to Birmingham to meet with me and for sharing this information, I am

Most cordially yours,

(Signed) FRANK A. ROSE
 Frank A. Rose
 President

FAR/mhp

IN UNITED STATES DISTRICT COURT

DEFENDANT'S EXHIBIT No. 34.

The following portion of the Constitution and By-Laws of The National Collegiate Athletic Association was introduced in evidence without objection and admitted as Defendant's Exhibit No. 34:

Section 6 (a) of Article III which is as follows:

"Section 6. Principles of Ethical Conduct.

(a) Individuals employed by or associated with member institutions for the administration, the conduct or the coaching of intercollegiate athletics, and students competing in intercollegiate athletics shall deport themselves with honesty and sportsmanship at all times to the end that intercollegiate athletics, as a whole, their institutions and they, as individuals, shall stand for the honor and dignity of fair play, and the generally recognized high standards associated with wholesome competitive sports. (Adopted: 1/11/52)."

[fol. 1423] Also the following paragraph of the Official Procedure Governing The National Collegiate Athletic Association Enforcement Program, which was likewise introduced as a part of Defendant's Exhibit No. 34, which was admitted without objection:

"Individuals employed by or associated with member institutions for the administration, the conduct or the coaching of intercollegiate athletics are, in the final analysis, teachers of young people. Their responsibility is an affirmative one and they must do more than avoid improper conduct or questionable acts. Their own moral values must be so certain and positive that those younger and more pliable will be influenced by a fine example. Much more is expected of them than of the less critically placed citizen."

[fol. 1424]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21,491

CURTIS PUBLISHING COMPANY, Appellant-Appellee,

versus

WALLACE BUTTS, Appellee-Appellant.

(AND REVERSE TITLE)

Appeals from the United States District Court for the
Northern District of Georgia.

PRINTED SUPPLEMENTAL RECORD ON APPEAL

[fol. 1425]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

APPELLANT'S ADDITIONAL DESIGNATION OF PARTS OF RECORD
TO BE PRINTED—Filed April 30, 1964

In accordance with Rule 23 of the Rules of this Court, Appellant hereby designates the following portions of the supplemental record in this case, which were forwarded to the Clerk of this Court in connection with Appellant's Appeal from the denial of its Motions for a New Trial Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure:

1. Defendant's Motion for a New Trial Pursuant to Federal Rule of Civil Procedure 60(b), with Exhibits A, B and C (filed February 28, 1964).

2. Entire deposition of Dr. Frank A. Rose, taken in the case of *Paul Bryant v. The Curtis Publishing Company*, No. 63-166, in the United States District Court for the Northern District of Alabama, Southern Division, on January 8, 1964.

3. Entire deposition of Dr. Frank A. Rose, taken in the case of *Paul Bryant v. The Curtis Publishing Company*, No. 63-166, in the United States District Court for the Northern District of Alabama, Southern Division, on January 17, 1964.

4. Entire deposition of Mrs. Marian H. Park, taken in the case of *Paul Bryant v. The Curtis Publishing Company*, No. 63-166, in the United States District Court for the Northern District of Alabama, Southern Division, on January 8, 1964.

[fol. 1426] 5. Order of the District Court denying Defendant's Motions for New Trial pursuant to Rule 60(b), Federal Rules of Civil Procedure (filed April 7, 1964).

6. Notice of Appeal from denial of Defendant's Motions under Rule 60(b), Federal Rules of Civil Procedure (filed April 10, 1964).

Submitted by:

Welborn B. Cody, Attorney for Defendant.

Of Counsel: Kilpatrick, Cody, Rogers, McClatchey & Regenstein, 1045 Hurt Building, Atlanta, Georgia 30303. Jackson 2-7420.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DESIGNATION BY APPELLEE OF ADDITIONAL MATTERS TO BE
INCLUDED IN THE RECORD—Filed May 4, 1964

Appellee, as authorized by Rule 23(a) of this Court, designates the following additional matter to be printed in the record in this action, in addition to the portions of the supplemental record in this case which were designated by [fol. 1427] Appellant as transmitted to the Clerk of this Court by letter from counsel for Appellant dated April 29, 1964:

1. Plaintiff's Response to defendant's Motions for New Trial under Federal Rule of Civil Procedure 60(b), filed in the office of the Clerk of the United States District Court, for the Northern District of Georgia, on March 6, 1964.

Respectfully submitted

William H. Schroder, Allen E. Lockerman, T. M.
Smith, Jr., Attorneys for Wallace Butts, Appellee.

Of Counsel: Troutman, Sams, Schroder & Lockerman,
1605 William Oliver Bldg., Atlanta, Georgia 30303.

[fol. 1428]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Civil Action No. 8311

WALLACE BUTTS, Plaintiff

versus

THE CURTIS PUBLISHING COMPANY, Defendant.

DEFENDANT'S MOTIONS FOR NEW TRIAL PURSUANT TO FEDERAL
RULE OF CIVIL PROCEDURE 60(b)—Filed February 28,
1964

I.

Defendant, having recently discovered evidence, which, although in existence at the time of trial, could not have been discovered by the exercise of due diligence, and which bears directly on the crucial issue in this case and is so significant that it would probably change the result if a new trial were granted, hereby moves this Court pursuant to Rule 60(b) (2) of the Federal Rules of Civil Procedure to vacate the judgment entered against defendant in this action and to grant a new trial for the following reasons:

1. As more specifically set forth in paragraphs 2 through 11 hereof, it is now established that the testimony of two key witnesses of plaintiff, given in the trial of this action, was false in that:

[fol.1429] (a) Dr. Frank A. Rose, in a deposition taken in an action then pending in the United States District Court for the Northern District of Alabama, entitled Paul Bryant v. Curtis Publishing Com-

pany, Civil Action No. 63-166, has, under oath, recanted and contradicted his testimony in this action that he dictated the letter dated March 6, 1963, to Dr. O. C. Aderhold (Exhibit D-21), a copy of which is attached hereto and made a part hereof as "Exhibit A", hastily, because he was catching the 8:40 A. M. flight to Washington, D. C. in order to attend a meeting of the American Council on Education.

(b) Dr. Frank A. Rose's testimony in this action that Exhibit D-21 was a hastily dictated, error-laden letter, has been shown to be false by the testimony, under oath of his secretary, Marian Park, given by deposition in said Bryant action, and corroborated by her shorthand notes contemporaneously made, that Exhibit D-21 was the fifth in order of thirty-two (32) letters "slowly and thoughtfully" dictated by Rose on the morning of March 5, 1963, and by a typed draft of a letter from Rose to Aderhold, dated March 5, 1963, found in the files of Rose, which is substantially but not entirely the letter identified as Exhibit D-21.

(c) The trial testimony of both Dr. Frank A. Rose and Paul Bryant that Bryant at no time remembered the telephone call to Butts of September 16, 1962, has been shown to be false by a letter from Bryant to Rose, dated February 28, 1963, which Rose has admitted, [fol. 1430] under oath, in the aforesaid deposition that he received. In said letter Bryant stated he remembered said telephone call "very well", as well as the subject matters of the call.

2. At the trial of this cause, defendant contended that the allegedly libelous statements contained in an article published in its publication THE SATURDAY EVENING POST entitled "The Story of a College Football Fix" were true and that in fact Wallace Butts, Athletic Director and former football coach of the University of Georgia, had given information on Georgia football plays to Paul Bry-

ant, Athletic Director and football coach of the University Alabama, immediately prior to the September 22, 1962, Georgia-Alabama football game.

3. Defendant introduced uncontradicted records of the Southern Bell Telephone Company which established that Butts and Bryant prior to the football game between the University of Georgia and the University of Alabama, were participants in a fifteen-minute telephone conversation on Thursday, September 13, 1963, and a sixty-seven minute telephone conversation on Sunday, September 16, 1962.

4. Defendant then called George Burnett, a witness who testified that he overheard the telephone conversation on Thursday, September 13, 1962, and that during said conversation Butts in fact gave information on Georgia football plays to Bryant.

5. Defendant then called J. D. Bolton, Comptroller of the University of Georgia, a witness who testified that during the course of the University of Georgia's investigation, Butts, when confronted with the evidence of George [fol. 1431] Burnett, said: "No doubt the guy heard what he said he heard."

6. In their testimony at trial, both Butts and Bryant refused to admit that they had engaged in said telephone conversations, and thus that no information concerning Georgia football plays had passed from Butts to Bryant.

7. As further proof of the fact that Butts had indeed given information concerning Georgia's football plays to Bryant, defendant produced Exhibit D-21, the letter dated March 6, 1963, from Dr. Frank A. Rose, President of the University of Alabama, to Dr. O. C. Aderhold, President of the University of Georgia, wherein Rose stated that Bryant admitted that Butts had given him information on Georgia football plays during the two telephone conversations.

8. Plaintiff then called Rose as a witness in an effort to explain away the damaging effect of Exhibit D-21.

9. The recently discovered evidence which is the basis for this motion completely repudiates the trial testimony of both Bryant and Rose on the following points:

a. At trial, Rose testified that Exhibit D-21 was not an accurate representation of Bryant's statements because the letter was dictated hurriedly on the morning of March 6, 1963, and was not corrected by anyone since Rose had to catch an 8:40 A. M. airplane to Washington, D. C. for a meeting of the American Council on Education. Rose's unequivocal testimony was:

"A. . . . I told Dr. Aderhold that I would be unable to give him an immediate report of my conversation [fol. 1432] with Coach Bryant, as I had to go to New York City to attend a meeting of the National Foundation for Infantile Paralysis, would be gone most of the week, which I was. I returned on Thursday evening, was tied up in conferences all day Friday, and then had to leave again Monday morning to go to Washington for a meeting of the American Council on Education, and I wrote to Dr. Aderhold that morning before I left.

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"Q. There was identified here yesterday a document, Exhibit No. D.21, being a letter to Dr. O. C. Aderhold, dated March 6, 1963, signed Frank A. Rose, from the office of the President, University of Alabama. The original at the moment is not available. I want to ask you some questions about that, if you recognize it as a letter from you to Dr. Aderhold—

"A. Yes, sir.

"Q. —or a copy of a letter?

"A. This is a copy of the letter I dictated to my secretary on the morning of March the 6th, before I left to go to Washington. I had to catch a plane at 8:40

and hurriedly dictated this letter. I did not have time to read it after dictating it. She signed it, was to confer with Coach Bryant and ask him if this was a good interpretation of the conversations that we had. Coach Bryant was out of the City, and she signed it and sent it on to Dr. Aderhold." R. 1415-1416.

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[fol. 1433] "Q. Is it your testimony—is it your testimony or is it not that you dictated the letter and your secretary signed it before you saw the letter written? Is that right?

"A. Yes, sir. And she was to check it with Coach Bryant to see if this was a good representation of our discussion.

"Q. Did she check it?

"A. No, sir. He was out of town, and I had told her to get it off that day, and she went ahead and sent it." R. 1457-1458.

Subsequent to trial, the deposition of Rose (filed contemporaneously herewith and made a part hereof) and his secretary, Marian Park, were taken in the action brought by Bryant referred to above. At said depositions, Rose and his secretary testified that Exhibit D-21 was not dictated on March 6, 1963, and Rose admitted that he was incorrect in testifying at trial that he had to catch an 8:40 A. M. airplane for Washington, D. C. on March 6, 1963:

"Q. Now, you stated previously in your testimony in Atlanta that the letter was dictated in a hurry on the morning of March 6th as you had to catch an 8:40 plane to Washington; is that correct?

"A. That's what I stated, but I didn't have my date book there with me previous to leaving here." Dep. 90.

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"A. Well, on checking my calendar before leaving here to go to Atlanta, I looked at March 6th and saw Washington there on my calendar, and took it that

that was the destination. The plane leaves here in the [fol. 1434] morning at 8:40 to go to Washington and New York and other places. But I am not positive that this was where I went; I am not positive that I dictated the letter that morning. Now, also, in my testimony, I said on Monday, Monday is the 4th. But, I didn't have my date book with me at the trial to check out the dates, and as I told you, I was going through two crises at that time as far as the University was concerned, and all I did was quickly refer to my calendar and saw that Washington was on March 6th; but, that meeting probably had been changed to our Friday meeting in Washington, which I met with Mr. Bennett, or it could have been that I went to Washington. I don't know, but during that period, during the period of January—of February, March, April, May, June, I took many trips to Washington, and over the State of which there are no records. Nothing on my calendar to designate that, because many of them were confidential trips to try to work out some of these problems that we have here at the University.

“Q. Doctor, is it fair to say that you cannot state, under oath, that you went to Washington on the morning of March 6th?

“A. I am saying that I am not sure.

“Q. And that when you said under oath in Atlanta that you did that, that it may be incorrect?

“A. It could be incorrect because I didn't have my date book. But, to me it is immaterial. I dictated the letter to my secretary hurriedly. I told her to check with Coach Bryant. I left this office to go somewhere, and during the interval, she typed the letter and tried [fol. 1435] to get in touch with Coach Bryant. He was out of town. She went ahead and mailed the letter. I didn't sign it, I didn't read it before it went out, and I left this office and I don't know exactly where I went. My calendar said March 6th I went to Washington.

“Q. Let's go back for a moment.

When did you dictate the letter?

"A. I am not sure when I dictated the letter.

"Q. Now—

"A. I thought looking on my calendar in August that I dictated the letter on Monday morning, March 6th; but, March 6th was Wednesday morning, and all I did was look at March 6th in August before I went over to Atlanta. I saw Washington there, and I thought that was the morning that I dictated the letter and went to Washington. On checking my secretary's notes, she had there that I dictated the letter on Tuesday morning. She states that she could be in error, that it could have been Monday morning. But, apparently now it looks as though I dictated the letter on Tuesday morning and left to go somewhere.

"Q. And Tuesday would be March 5th?

"A. Yes, sir." Dep. 91-93.

"Q. Am I correct that it is now your best recollection that the letter was dictated on Tuesday, March 6th [5th]?

"A. I don't have any recollection about it at all. I don't know when it was dictated. Now, my secretary's notes show that it was dictated Tuesday, March 5th, in the morning. She said, and Mr. Bennett says that I left here on Tuesday morning. No one knows where I was going. I have no record of it. This is not unusual, because during this period I made many confidential trips. Sometimes I would tell Mr. Bennett and [fol. 1436] sometimes I wouldn't tell him.

"Q. It is true your expense records show no trips for March 4, 5, and 6?

"A. There is no expense record for any of these confidential trips.

"Q. I understand that, but I am asking, do your records show any trips, not whether you made any trips, but do your expense records show any trips for March 4, 5, and 6?

"A. I don't think so." Dep. 104.

After a court order was secured in the Bryant case requiring Rose to answer the vital question as to his whereabouts on March 5, 1963, he testified at a subsequent deposition on January 8, 1964, a copy of which is filed contemporaneously herewith and made a part hereof:

"Q. —you were asked this question: 'This trip that commenced on the morning of March 5, do you have any idea how long it took', and I believe you answered, 'No, sir, I don't. I cannot tell you exactly.'

"Q. Do you know how you traveled', and you answered, 'No, sir.'

Now, you previously answered you did not know where you went on this occasion, is that correct, sir?

"A. Now, where are you on here, what page?

"Q. 138.

"A. 138.

"Q. The last—

"A. Yes.

"Q. —complete answer on that page.

"A. I am not sure where I went.

[fol. 1437] "Q. I want to pick up there, if I may.

"A. All right.

"Q. Do you have any recollection, Dr. Rose, of where you went on that date on March 5th?

"A. Mr. Embry, I don't know what legal term or what a lawyer means by 'recollection.' If you are talking about a guess, I can make a guess. I have done everything I can from checking my notes, notebook, my wife's notebook and talking with members of my staff trying to ascertain exactly where I went that day." Dep. 2-3.

Rose's secretary testified in her deposition in the Bryant case (a copy of which is filed contemporaneously herewith and made a part hereof), that Exhibit D-21 was dictated slowly and thoughtfully and was the fifth letter in a series

of thirty-two which took almost one hour and a half to dictate. (Dep. pp. 11-13). Rose's correspondence file contains a carbon copy of an apparent earlier draft of Exhibit D-21, dated March 5, 1963 (a copy of which is attached hereto and made a part hereof as "Exhibit B"), which differs slightly from the March 6 letter Dr. Aderhold received, and yet Rose's secretary testified at her deposition in the Alabama case that no draft was prepared:

"Q. Do you recall whether Mr. Bennett made any changes in the letter?

"A. I know of no changes that were made in the letter.

"Q. Anyone make any changes in the letter?

"A. No, sir." Dep. 18.

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"Q. The letter was typed up in final form?

"A. Yes, sir. Now, right here I notice I made two sentences here. Occasionally he will dictate long in- [fol. 1438] volved sentences and I will cut it down into two shorter sentences and I may have done that in this first paragraph.

"Q. You would do that when you transcribe the letter?

"A. Yes, sir.

"Q. As you read from your notes, part of your secretarial job is to make slight changes necessary in grammar?

"A. Yes, sir.

"Q. No first draft or anything shown to anyone on this letter?

"A. No, sir.

"Q. You are absolutely certain?

"A. Yes, sir." Dep. 20.

When Mrs. Park read her stenographic notes of the March 6 letter at her deposition, they corresponded more nearly to the March 5 draft than to the actual letter of March 6. (Dep. pp. 7-10).

b. At the trial, Bryant denied that he had made the statements attributed to him in Exhibit D-21. He testified that he was unable specifically to recall either of the two telephone conversations in question and therefore did not remember what matters he and Butts had discussed. In regard to the Sunday, September 16, 1962, call, Bryant testified:

"Q. It is also related or set forth in the article that on Sunday, September 16, 1962, you and Coach Wallace Butts had another telephone conversation, which, I believe the Post states, was initiated by you. You familiar with that general statement as it appears in the Post? [fol. 1439]. "A. I am familiar with it, but I do not remember whether or not I made the call, but according to the telephone company's records, again, the call was made." R. 540.

• • • • •
 "Q. Has it occurred to you to check up on the length of this telephone conversation you had with Coach Butts on September the 16th?

"A. It has.

"Q. How long was it?

"A. According to the record I got, sixty-seven minutes.

"Q. And you don't remember anything about it?

"A. I don't remember when or which one. Insofar as the football game, my vivid memory, I went over the notes up there this morning. Outside of that I hadn't even looked at them since the game or the movie.

"Q. You put this call in to Coach Butts, didn't you?

"A. I don't know.

"You don't remember whether you—

"A. I don't know the call was placed.

"Q. You don't remember whether you—don't remember anything that was said?

"A. I remember plenty of things that were said sometime, sir. I don't even know the call was made. I

am not sure all these notes weren't made after the call was made." R. 593-594.

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[fol. 1440] "Q. As a matter of fact, you called him on September 16; that is your evidence, isn't it?

"A. I don't know that I called him. According to the telephone records somebody called him, and I supposed—I probably did, but I don't know that, sir." R. 600.

Furthermore, in addition to the three excerpts from the evidence of Bryant given at the trial, in three other instances he testified that he did not remember the telephone call in question. (R. pp. 560, 582-583 and 602.) Rose testified that he had interrogated Bryant on several occasions between February 24, 1963, and March 6, 1963, and that Bryant was never able specifically to recall either of the telephone conversations or what was discussed. Concerning the Sunday call, Rose stated under oath:

"A. Coach Bryant told me that night that he didn't remember calling Coach Butts back.

"Q. Well, where did you get—where did you get the date September 16th, and who from?

"A. He told me that he could have called him back, and then I checked our records and there was a call to Athens, and I asked him if he could have made that call, and he still couldn't remember whether he made that call or not." R. 1436-1437.

However, a recently discovered letter, dated February 28, 1963, written by Bryant to Rose, states that Bryant remembered very well calling Butts on a Sunday in the middle of September and discussing the new interpretation of the piling-on rule and two pass "routes". This letter, which is attached hereto and made a part hereof as "Exhibit C", was discovered by defendant on October 2, 1963, pursuant to a Notice to Produce in the Bryant case. It in part provides as follows:

"We were able to find a record of only three calls from me to the person in Athens. The first was on September 9th; the second on September 14th; and the third on September 16th.

.

"I like to think that these calls were fruitful so far as our program is concerned; *particularly, the one the middle of September on a Sunday, because I remember very well that this gentleman discussed in detail with me the new interpretation of the piling on rule and warned us to warn our team to be very careful or either we might lose a good player early like LeRoy Jordan or some other aggressive defensive man. On that particular date, we also discussed at length some coaching points on some pass routes that although we were using we had had very little success with.*" (Emphasis added).

Despite the fact that Rose admitted he received the said letter, dated February 28, 1963, from Bryant prior to March 6, 1963 (Rose-Alabama Deposition, pp. 81-82), he still maintained throughout his testimony at said deposition that Bryant reported to him throughout Rose's investigation of the matter and even more recently that he had no recollection of the Sunday call:

"Q. Did you also, in the course of this meeting, ask him [Bryant] if he had called Mr. Butts on September 16th, 1962?"

[fol. 1442] "A. Yes, sir.

"Q. What was his answer?"

"A. And he did not recall whether he had made that call or not, but stated that he could have made the call, that there had been several calls made to Coach Butts and to other coaches and that he could look that up and find out whether he had made that call or not." Dep. 43-44.

.

"Q. Now, did he give you any explanation as to why he might have called Mr. Butts back on the 16th?

"A. He said that the only reason that he could, and he didn't recall that he had called him back, that he could have called him back, would have been that Coach Butts did not understand some of the questions that he was raising, and was to try to think about it or find out what he was talking about, and that he was to try to get in touch with him; but, he didn't recall whether that had been done, or whether that was it or not." Dep. 53.

.

"A. . . . that he [Bryant] doubted seriously that he had called Coach Butts back, though there was a telephone charge to that." Dep. 85.

.

"A. . . . it was during the period of February 24th to March 6th, that I talked to Coach Bryant on those [fol. 1443] two other occasions, but I am not certain. But, I think it was, because I was away from the office an awful lot immediately following that.

"Q. Now, during those subsequent conversations, did Mr. Bryant tell you that he had found there had been a call charged to him to Coach Butts in Athens?

"A. I believe he said that there had been a call charged to the Department, but that he did not recall talking to him specifically himself on that particular time."

"Q. Did he state to you at that time whether he knew what was discussed in that subsequent call on September 16th?

"A. No, sir, except he went over what you and I have gone over that they could have talked about; these rule interpretations, the Butt blocking and Head blocking, and so forth and so on.

"Q. In other words, what he said was there is a call, I don't know whether I made it or not, I don't know

what I talked about, if I did make it, but what I might have talked about was rule interpretations, ticket sales and Continental Enterprises!

"A. Yes, sir. That's pretty much it.

"Q. How, did he later—strike that.

And was that the state of your information at the time you decided to write Mr. Aderhold?

"A. Yes, sir.

"Q. In other words, up to the time you wrote Dr. Aderhold, Coach Bryant had never informed you that they had made a call on September 16th; is that correct?

"A. That's correct.

[fol. 1444] "Q. And he never told you what he talked about on those dates, because he didn't remember what he talked about; is that correct?

"A. That's correct." Dep. 88-90.

.

"Q. Now, when you—you remember when you gave your deposition in the Butts case on May 27, 1963?

"A. Yes, sir.

"Q. You were asked about that deposition in Atlanta, and you stated at that time, that is at the time you gave the deposition, you did not know for certain if Bryant had called Butts on September 16th, or what had been talked about?

"A. Yes, sir.

"Q. Now, is that correct, that at that time you gave your deposition you did not know for sure that Bryant had called Butts or what was talked about?

"A. I wasn't certain. I thought at that time that he had called, but I wasn't certain.

"Q. Were you certain at the time you gave your testimony in Atlanta in August of this year, or of last year?

"A. I thought so, and I am still not certain today.

"Q. In other words, you are not certain today that Coach Bryant called Coach Butts on September 16, 1962, or what they talked about?

"A. No, sir, because Coach Bryant said he is not certain." Dep. 120.

.

[fol. 1445] "Q. Did Coach Bryant tell you, before this letter was written, that he did not know whether he had made the September 16th call to Coach Butts?

"A. He said he didn't remember it, but he said he could have done it.

"Q. Did he also say he didn't remember what was discussed?

"A. Yes, sir.

"Q. Am I correct in understanding that is what he has told you up to the present time?

"A. That is what he told me just recently again.

"Q. But, he doesn't remember the calls and he doesn't remember what was said?

"A. All he remembers is that they talked many times about all of these things, but that he doesn't remember specifically.

"Q. Either the call or what was talked about?

"A. Yes, sir." Dep. 132-133.

.

"Q. Coach Bryant ever admitted to you that he did call Coach Butts on September 16, 1962?

"A. No, sir.

"Q. Did he ever admit to you what he talked about on that date, September 16, 1962?

"A. No, sir, but he did tell me that he could have called him and this could have been what they talked about; but, he didn't know for sure." Dep. 137.

10. Therefore, on the crucial issue of whether Butts gave Bryant information on Georgia football plays, plaintiff was able to override Bryant's admission in Exhibit D-21 that

[fol. 1446] Butts had in fact given him such information, by means of Rose's characterization of Exhibit D-21 as a hasty, error-laden letter and Bryant's total lack of recollection concerning the telephone calls, when, in fact, defendant's newly discovered evidence establishes that Bryant did specifically recall receiving information about football plays from Butts during one of the telephone calls, that Exhibit D-21 was a careful and thoughtful letter, and that someone reviewed the draft of such letter dated March 5 prior to its becoming the crucial letter of March 6.

II

Plaintiff, having filed a document on January 30, 1964, repudiating his prior consent for a reduction in the jury's verdict, defendant hereby moves this Court pursuant to Rule 60(b) (3), (4) and (6) to vacate the judgment entered against defendant in this action and to grant a new trial for the following reasons:

1. On January 14, 1964, the Court entered an order granting the defendant's motion for a new trial "unless the plaintiff, Wallace Butts, within twenty (20) days after the service of this order, shall, in a writing filed with the Clerk of the United States District Court for the Northern District of Georgia, remit all the punitive damages awarded above the sum of \$400,000."

2. On January 20, 1964, the plaintiff, Wallace Butts, filed a document entitled "Consent of Wallace Butts to Remit" pursuant to which he stated that he remitted all punitive damages awarded above the sum of \$400,000.

3. The Court, on January 22, 1964, set aside the previous judgment of August 20, 1963, for the plaintiff in the amount [fol. 1447] of \$3,060,000 and entered a new judgment in the amount of \$460,000, based upon the plaintiff's "having filed with the Clerk of this Court a writing remitting all of the punitive damages awarded above the sum of \$400,000."

4. Subsequent to the filing of defendant's notice of appeal on January 24, 1964, the plaintiff filed a document on January 30, 1964, praying that the Court of Appeals restore the original award of \$3,060,000, as the plaintiff had "yielded to the mandate of the District Court and remitted in writing" all punitive damages awarded by the jury above the sum of \$400,000.

5. As the plaintiff by the aforesaid document filed January 30, 1964, either revoked his consent for a reduction of the verdict by \$2,600,000 filed January 20, 1964, or is maintaining by such pleading that his consent was never voluntarily given for such reduction, the judgment entered by the Court on January 22, 1964, should be vacated, since no valid consent to a reduction of the jury's verdict has been filed by the plaintiff pursuant to the Court's order of January 14, 1964, that portion of the Court's order of such date granting the defendant's motion for a new trial should be allowed to become operative.

A hearing upon these motions is respectfully requested.

Welborn B. Cody, Attorney for Defendant

[fol. 1448] *Duly sworn to by John J. Runzer, jurat omitted in printing.*

[fol. 1449]

EXHIBIT "A" TO DEFENDANT'S MOTIONS FOR NEW TRIAL

Deft's. Ex. 21

Case 8311

Admitted Aug. 15, 1963

University of Alabama
University, AlabamaOffice of the
President

March 6, 1963

Confidential

Dr. O. C. Aderhold, President
The University of Georgia
Athens, Georgia

Dear Dr. Aderhold:

I have spent a great deal of time investigating thoroughly the questions that were raised during our meeting in Birmingham and have talked with Coach Bryant at least on two occasions. As best as I can ascertain, this is the information that I have received.

Coach Butts has been serving on the football rules committee, and at a meeting held last summer of the Rules Committee the defenses used by Coach Bryant, L. S. U. and Tennessee were discussed at length and new rules were drawn up that would severely penalize these three teams unless the defenses were changed, particularly on certain plays.

[fol. 1450] Coach Butts had discussed this with Coach Bryant and the two were together at some meeting where Coach Butts told Coach Bryant that the University of Georgia had plays that would severely penalize the Alabama team and not only would cause LeRoy Jordan, an Alabama player, to be expelled from the game, but could severely injure one of the offensive players on the Georgia team.

Coach Bryant asked Coach Butts to let him know what the plays were, and on September 14 he called Coach Bryant and told him. There was a question about another one of the offensive plays of the Georgia team that could seriously penalize the Alabama team and bring on additional injury to a player. Coach Bryant asked Coach Butts to check on that play, which he did, and called back on September 16.

It was then that Coach Bryant changed his defenses and invited Mr. George Gardner, Head of the Officials of the Southeastern Conference, to come to Tuscaloosa and interpret for him the legality of his defenses. This Mr. Gardner did the following week. The defenses were changed and Coach Bryant was grateful to Coach Butts for calling this to his attention.

Coach Bryant informs me that calling this to his attention may have favored the University of Alabama football team, but that he doubts it seriously. He did say that it prevented him from using illegal plays after the new change of rules.

I have checked into other matters that were discussed and can find no grounds for Mr. Bisher's accusations, and as I understand it he has now decided for lack of information to drop the matter.

[fol. 1451] Dr. Aderhold, this continues to be a serious matter with me, and if you have any additional information I would appreciate your furnishing me with it as I am not only anxious to work with you but to satisfy my own mind.

Thanking you for coming to Birmingham to meet with me for sharing this information, I am

Most cordially yours,

(Signed) FRANK A. ROSE
Frank A. Rose
President

FAR/mhp

EXHIBIT "B" TO DEFENDANT'S MOTIONS FOR NEW TRIAL

COPY

COPY

COPY

March 5, 1963

Confidential

Dr. O. C. Aderhold, President
The University of Georgia
Athens, Georgia

Dear Dr. Aderhold:

I have spent a great deal of time investigating thoroughly the questions that were raised at our meeting in Birmingham. I have talked with Coach Bryant on at least two occasions and as best as I can ascertain this is the information that I have received.

[fol. 1452] Coach Butts has been serving on the football rules committee and at a meeting held last summer of the rules committee the defenses used by Coach Bryant, L. S. U. and Tennessee were discussed at length and new rules were drawn up that would severely penalize these three teams unless the defenses were changed, particularly on certain plays.

Coach Butts had discussed this with Coach Bryant and the two were together at some meeting and Coach Butts had told Mr. Bryant that the University of Georgia had several plays that would severely penalize the Alabama team and not only would cause LeeRoy Jordan, an Alabama player, to be expelled from the game but could severely injure one of the offensive players on the Georgia team.

Coach Bryant asked Coach Butts to let him know what the plays were and on September 14 he called Coach Bryant and told him. There was a question about another one of the offensive plays of the Georgia team that could seriously penalize the Alabama team and bring additional injury to

a player. Coach Bryant asked Coach Butts to check on that and he would call back on September 16. This he did.

It was then that Coach Bryant changed his defenses and invited Mr. George Gardner, Head of the Officials of the Southeastern Conference, to come to Tuscaloosa and interpret for him the legality of his defenses. This Mr. Gardner did the following week. The defenses were changed and Coach Bryant was grateful to Coach Butts for calling this to his attention.

Coach Bryant informs me that calling this to his attention may have favored the University of Alabama football team, but that he doubted it seriously. He did say that [fol. 1453] it prevented him from using illegal plays after the new change of rules.

I have checked into other matters that were discussed and can find no grounds for Mr. Bisher's accusations, and as I understand it, he, too, has decided for lack of information to drop the matter.

Dr. Aderhold, this continues to be a serious matter with me, and if you have any additional information I would appreciate your furnishing me with it as I am not only anxious to work with you, but to satisfy my own mind.

Thanking you for coming to Birmingham to meet with me and for sharing this information, I am

Most cordially,

Frank A. Rose
President

FAR/mhp

[fol. 1454]

EXHIBIT "C" TO DEFENDANT'S MOTIONS FOR NEW TRIAL

University of Alabama
Department of Athletics
University, Alabama
February 28, 1963

1961

The Crimson Tide

National Football Champions

Dr. Frank Rose
President
University of Alabama
University, Alabama

Dear Dr. Rose:

We were able to find a record of only three calls from me to the person in Athens. The first was on September 9th; the second on September 14; and the third on September 16th. He must have telephoned me some during that period because I am sure we talked more than that. As a matter of fact, over the years, I have talked with him by phone some eight or ten times per year. I might add, I have done the same thing with other coaches, Duffy Daugherty, Bud Wilkinson, Darrell Royal, and Bobby Dodd, for instance.

There were two additional calls made to Athens; one from our Publicity Department on September 11 and one by an Assistant Coach on September 27.

I like to think that these calls were fruitful so far as our program is concerned; particularly, the one the middle of September on a Sunday, because I remember very well that [fol. 1455] this gentleman discussed in detail with me the new interpretation of the piling on rule and warned us to warn our team to be very careful or either we might lose a

good player early like LeRoy Jordan or some other aggressive defensive man. On that particular date, we also discussed at length some coaching points on some pass routes that although we were using we had had very little success with. This man over the years had had tremendous success with the passing game; in particular, these two routes and after leaving these coaching points we began to use the two particular passes often, including one for the clutch Touchdown against Tennessee in Knoxville the third week in October.

Again, I want to say that I have for years discussed football; ours, his football with this man and like to feel that I would still have that privilege because I have a great deal of respect for his knowledge of the game, particularly the passing game.

Respectfully yours,

(Signed) PAUL BRYANT
Paul Bryant
Director of Athletics

PB:mp

[fol. 1456]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTIONS FOR NEW
TRIAL UNDER FEDERAL RULE OF CIVIL PROCEDURE 60(h)—
Filed March 6, 1964

In response to defendant's motions for new trial filed on February 28, 1964, plaintiff, Wallace Butts, respectfully shows:

I.

All of defendant's allegations relating to certain so-called "recently discovered evidence" are specifically denied and, at most, constitute a continuation of defendant's manifest design to trifle with this Honorable Court.

1. To argue, as defendant does, that the evidence in question "would probably change the result if a new trial was granted" is untenable and ridiculous. Said evidence and particularly the letter from Paul Bryant to Dr. Frank A. Rose dated February 28, 1963 and attached to defendant's motions as Exhibit 3, actually sustain the fact that at no time has Wallace Butts ever acquainted Paul Bryant with any plays or formations to be used by a University of Georgia football team against the University of Alabama. Arguments are supposed to be supported by fact. The facts are dead against defendant, and defendant knows it.

Furthermore, the purported significance attached by defendant to this so-called "recently discovered evidence" cannot be reconciled with defendant's action in paying Paul Bryant \$300,000, tax free, to dismiss his libel suit growing [fol. 1457] out of this identical Saturday Evening Post article when *at that very time* defendant had all of this "recently discovered evidence" in its possession.

2. The scurrilous and unwarranted assertion that the testimony of witnesses Paul Bryant and Dr. Frank A. Rose given at the trial of this case "was false" is specifically

denied and is absolutely unsupported. To thus falsely, inexcusably, and publicly accuse two innocent individuals is just another manifestation of defendant's proudly admitted editorial policy of "sophisticated muck-raking".

3. To say under oath, as defendant has in its said motions, that this alleged "recently discovered evidence" (as weak and irrelevant as it is) "could not have been discovered by the exercise of *due diligence*" is entirely and patently false. Defendant states on page 11 of its said motions that the aforementioned innocuous letter from Paul Bryant to Dr. Rose, dated February 28, 1963, "was discovered by defendant on October 2, 1963 pursuant to a Notice to Produce in the Bryant case". Defendant gives no reason or excuse for not using the same type process to obtain access to this letter prior to the Wallace Butts trial by exercising the same "due diligence" it boasts it used prior to the date scheduled for the Paul Bryant trial. This, for sure, clearly demonstrates that defendant exercised about as much "due diligence" in this regard as it did in attempting to ascertain the truth before it published its libelous article in the March 23rd issue of the Saturday Evening Post.

II.

Defendant's second ground in its motions for new trial is as equally lacking in merit as the first and all allegations [fol. 1458] contained therein, being purely legal conclusions, are expressly denied.

The substance of defendant's argument is this: Plaintiff's unconditional "consent" to the remittitur, i.e. the reduction in the amount of the punitive damages award, is no consent at all because plaintiff later decided to file a cross-appeal and ask the Court of Appeals to reinstate the original award or increase the amount by which the Trial Court reduced such award. But, defendant argues, one cannot file a cross-appeal in such a situation. Thus we find ourselves in the anomalous position of defendant contending that

what it says is an invalid and illegal cross-appeal taking precedence over and thereby nullifying a perfectly valid and legal remittitur. We respectfully submit that if, as a matter of law, plaintiff cannot cross-appeal after accepting a remittitur, then the proper forum to urge this point is in the Court of Appeals and not here.

Wherefore, having fully responded, plaintiff prays that said motions be summarily dismissed.

Troutman, Sams, Schroder & Lockerman, William
H. Schroder, Allen E. Lockerman, T. M. Smith,
Jr., Attorneys for Plaintiff.

1605 William-Oliver Bldg., Atlanta 3, Georgia.

[fol. 1459] *Duly sworn to by William by H. Schroder,
jurat omitted in printing.*

[fol. 1459a]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 8311

[Title omitted]

DEFENDANT'S ADDITIONAL MOTION FOR NEW TRIAL PURSUANT
TO FEDERAL RULE OF CIVIL PROCEDURE 60 (b)—Filed
March 23, 1964

Because of the drastic change in the law of libel and the constitutional restrictions placed upon an action for libel brought about by the Supreme Court's recent decision, on March 9, 1964, in the case of *New York Times Company v. Sullivan*, 32 U.S. Law Week 4184 (March 10, 1964), the defendant hereby moves this Court, pursuant to Rule

[File endorsement omitted]

60 (b) (6) to vacate the judgment entered against defendant in this action and to grant a new trial for the following reasons:

1. The verdict and judgment in this case awarded plaintiff damages for injury to his reputation as a football coach on account of statements made by defendant concerning plaintiff's actions while acting as Director of Athletics of the University of Georgia. The Director of Athletics of the University of Georgia is a public official: *Page v. Regents of University of Georgia*, 93 F.2d 887 (5th Cir., 1937) (reversed in 304 U.S. 439 upon other grounds).

2. Said *New York Times Company v. Sullivan* case held that the constitutional guarantees provided by the First and Fourteenth Amendments prohibit a public official from recovering *any* "damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false, or with reckless disregard of [fol. 1459b] whether it was false or not."

3. The following portions of the instruction given by the Court to the jury constitute error in that the Court stated that general damages could be recovered by the plaintiff without the plaintiff being required to prove the existence of "actual malice" on the part of the defendant:

"I charge you that under Georgia law, a written publication which affects one injuriously in his trade or calling, such as the plaintiff Butts' coaching profession in this case under consideration, and contains imputations against his honesty and integrity, and which would, as its natural and probable consequence, occasion pecuniary loss, constitutes a cause of action and is libelous per se, and the right follows to such damages as must be presumed to proximately and necessarily result from such a publication." R. 1624.

"As the publication was libelous per se, I charge you that malice is to be inferred. However, the exist-

ence of malice may be rebutted by proof of the defendant which, in all cases, shall go in mitigation of damages.

"At this point, I think it is well that I should explain to you the meaning of malice under the law of defamation. Malice, in the law of defamation may be used in two senses. First, in a special or technical sense to denote absence of lawful excuse or to indicate absence [fol. 1459c] of privileged occasion. Such malice is known as implied malice or malice in law. There is no imputation of ill will to injure with implied malice. Secondly, malice involving intent of mind and heart or ill will against a person is classified as express malice or malice in fact." R. 1630.

4. Applying the constitutional standards enunciated in the said *New York Times Company v. Sullivan* case, the proof presented in the instant case to show actual malice on the part of the defendant lacks the "convincing clarity", which such constitutional standards demand, and thus such evidence cannot sustain the judgment entered for the plaintiff. There was no evidence introduced in the instant case to prove that the statements made in the article defendant published in the March 23, 1963 issue of "The Saturday Evening Post" concerning plaintiff were made with knowledge on the part of the defendant that they were false, or with a reckless disregard of whether they were false or not. On the contrary, plaintiff proved in his own case that the Post editors responsible for the publication of the story—Blair and Thomas, R. 1024—were satisfied of the truthfulness and accuracy of the story. R. 1038, 1137-1138.

Therefore, the instant case was clearly tried upon unconstitutional assumptions, the correct principle unfortunately not being announced until after the trial by the Supreme Court's landmark decision in the *New York Times Company v. Sullivan* case. As Mr. Justice Goldberg recognized in that case, "we are writing upon a clean slate."

A hearing upon this Motion is respectfully requested.

[fol. 1459d] Welborn B. Cody, Attorney for Defendant.

Of Counsel: Kilpatrick, Cody, Rogers, McClatchey & Regenstein, 1045 Hurt Building, Atlanta, Georgia 30303, Jackson 2-7420.

Certificate of Service (omitted in printing).

[fol. 1460]

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 8311

WALLACE BUTTS, Plaintiff,

versus

CURTIS PUBLISHING COMPANY, Defendant.

OPINION AND ORDER—APRIL 7, 1964

Defendant, on February 28, 1964, under Rule 60(b) (2), Federal Rules of Civil Procedure, 28 U.S.C.A., filed a motion for a new trial upon the ground of the discovery of new evidence, contending that such evidence conclusively demonstrates the falsity of the testimony of two of the plaintiff's witnesses, Dr. Frank A. Rose and Coach Paul Bryant, and strongly supports the defense of justification. The motion is also based upon alleged conduct of plaintiff in attempting to avoid the conditions on which defendant's motion for a new trial was denied and a judgment in plaintiff's favor was granted.

Thereafter, defendant filed an additional motion for a new trial pursuant to Rule 60(b), Federal Rules of Civil Procedure, because of a change in the law of libel and the constitutional restrictions placed upon an action for libel

by virtue of the United States Supreme Court decision of March 9, 1964, in the case of *New York Times Company v. Sullivan*.

Even though a final judgment had been entered in the case at hand and an appeal from such judgment has been perfected by the filing of a notice of appeal, this District [fol. 1461] Court retains jurisdiction to consider and deny such motions under Rule 60(b). See *Ferrell v. Trailmobile, Inc.* (5 C.A., 1955), 223 F. 2d 697.

The gist of Part I of the first motion is that there is substantial variance between the testimony of Dr. Rose and Coach Bryant in their testimony at the trial of this case and depositions which were later given by Dr. Rose and his secretary, Mrs. Marian H. Park, in an action pending in the Northern District of Alabama in the case of *Paul Bryant v. Curtis Publishing Company*, Case No. 63-166, which testimony by deposition was taken on January 8, 1964.

In attempting to sustain its plea of justification, the defendant introduced at the trial of this case a letter dated March 6, 1963, written by Dr. Rose, as President of the University of Alabama, to Dr. O. C. Aderhold, as President of the University of Georgia. The letter concerns certain telephone calls relating to conversations on new football rule changes which had transpired between Coach Bryant and plaintiff Butts. At the trial, Dr. Rose in his testimony, in attempting to explain the contents of the Aderhold letter, stated that the letter was hurriedly dictated on the morning of March 6, 1963, and signed by his secretary, Mrs. Park, as he (Dr. Rose) was attempting to catch an early morning plane for Washington, D. C., to attend a meeting of the American Council on Education.

In the depositions taken in the *Bryant* case, defendant shows that Dr. Rose did not go to Washington, D. C., on the date of March 6, 1963, nor was the letter hurriedly dictated as there was a previous draft of the Aderhold letter, dated March 5, 1963, which draft was substantially the same as the contents of the March 6, 1963, original letter mailed and received by President Aderhold.

[fol. 1462] The defendant further asserts that Dr. Rose, in his testimony at the trial testified that Coach Bryant told him he did not remember the call of September 16, 1962, to Coach Butts in Athens, Georgia, although he could have made it, and even though Rose had interrogated Bryant several times between February 24, 1963, and March 6, 1963. However, by a recently discovered letter, dated February 28, 1963, written by Bryant to Rose, Bryant, in this letter, informed Rose that he remembered the call to Butts in the middle of September very well, and that although Rose admitted receiving the letter dated February 28, 1963, prior to March 6, 1963, Rose still maintained throughout his testimony in said deposition that Bryant reported to him through all the investigation that he had no recollection of the Sunday, September 16, 1962, telephone call to plaintiff Butts.

Defendant contends that on the issue of the letter (Exhibit D-21) plaintiff was able to explain away the contents of the letter by means of Rose's characterization of Exhibit D-21 as a hasty, error-laden letter, and Bryant's total lack of recollection concerning the telephone call, when in fact the newly discovered evidence establishes that Bryant did recall the Sunday telephone call and that the letter was not a hasty, error-laden letter, but was a careful and thoughtful letter, and that someone received the draft of such letter dated March 5, 1963, prior to its final draft on March 6, 1963.

The phrase "newly discovered evidence" refers to evidence of facts in existence at the time of the trial of which the aggrieved party was excusably ignorant. In the case of *Chemical Delinting Company v. Jackson*, 193 F. 2d 123, 127, the Fifth Circuit Court of Appeals has held:

[fol. 1463] "The motion must show that the evidence was discovered since the trial; must show facts from which the court may infer reasonable diligence on the part of the movant; must show that the evidence is not merely cumulative or impeaching; must show that

it is material; and must show that such evidence will probably produce a different result."

See also *King v. Leach* (5 C.A., 1942), 131 F. 2d 8.

The evidence clearly shows that the letter from Bryant to Rose was in existence in the latter part of February, 1963. The evidence further shows that the draft of the letter from Rose to Aderhold was in existence prior to March 6, 1963. Under the liberal discovery rule provided by the Federal Rules of Civil Procedure, the defendant could have obtained all of this evidence which it now has available prior to the trial of this case in August, 1963. No facts have been shown by the movant here from which this Court may infer reasonable diligence on its part.

Even assuming the evidence could not have been produced at the trial in August by due diligence—inferences not fairly conveyed by the record—the evidence now presented tends merely to affect the weight and credibility of the evidence of Dr. Rose and does not constitute a proper basis for a new trial. See *English v. Mattson* (5 C.A., 1954), 214 F. 2d 406, 409; *Grant County Deposit Bank v. Greene*, 200 F. 2d 835.

After considering the "newly discovered evidence" presented in the motion at hand, and from this Court's review of all the evidence presented at the trial of the case, even if all the testimony entered at this hearing on the motion [fol. 1464] had been presented at the trial in August, this new evidence affecting the credibility of Dr. Rose would not have changed the verdict in this case. See *Chemical Delinting Company v. Jackson*, *supra*, and *English v. Mattson*, *supra*.

The second ground advanced by the defendant for a new trial under Rule 60(b) is to vacate the judgment entered against the defendant and to grant a new trial because after the plaintiff had filed his written consent to the remittitur (this consent still being on file) that, to the defendant's motion for a new trial, the plaintiff has filed a notice of cross-appeal. The question of the cross-appeal

and the merits thereof are not for decision by this trial Court, but is a matter to be considered on appeal. See *Woodworth v. Chesbrough*, 244 U.S. 79, 61 L. Ed. 1005.

The thrust of defendant's additional motion for a new trial under Rule 60(b) is based upon the recent decision of the United States Supreme Court, rendered on March 9, 1964, in the case of *New York Times Company v. Sullivan*. The Supreme Court's ruling in the *Times* case, speaking through Mr. Justice Brennan, held:

"The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

The contention of the defendant is that the *Times* case is controlling for the case at hand, and that under this motion the previous judgment should be vacated and a new trial [fol. 1465] granted. In order that a prior decision of a court shall govern, such prior decision must be in point, and as a test in determining whether the adjudicated case is a precedent, such case should be measured by a similarity to the second case in its controlling facts. See *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 97 L. Ed. 54.

In the *Times* case, the Supreme Court held actual malice must be proved to recover general damages in actions of libel brought by public officials against critics of their official misconduct. However, the concurring opinion of Justices Goldberg and Douglas stated:

"Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech."

In the present motion at hand, the defendant contends that plaintiff's action comes under the *Times* ruling in that plaintiff was a public official, and that the verdict and judgment was awarded plaintiff as damages for injury to his reputation as a football coach on account of a publication made by the defendant concerning plaintiff's actions while acting as Director of Athletics at the University of Georgia. In the trial of the case, movant defended the action by entering a plea of justification, and no defense was made or evidence introduced concerning Butts' position as Athletic Director or as a public official. Georgia law provides under certain conditions communications concerning the acts of public men in their public capacity and reference therewith to be deemed privileged. Georgia Code Annotated, Section 107-709(6). Just where in the ranks of government employees the "public official" designation extends, the Supreme Court in the *Times* case did not de-[fol. 1466] termine.¹ The decision did determine that Sullivan, as an elected city commissioner of Montgomery, fitted into the category of public officials.

Under Georgia law, members of the Board of Regents of the University System are public officials. Georgia Sessions Laws, 1931, Pages 7, 45. The evidence presented at the trial shows that plaintiff was Director of Athletics at the University for some two years prior to February, 1963, at which time he resigned. The article complained of was published in the defendant's issue of March 23, 1963. The Board of Regents at both the University of Georgia (located at Athens) and the Georgia School of Technology (located at Atlanta) control the athletic programs of the

¹ In Footnote 23 of the majority opinion, it was stated: "We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. Cf. *Barr v. Matteo*, 360 U.S. 564, 573-575. Nor need we here determine the boundaries of the 'official conduct' concept. It is enough for the present case that respondent's position as an elected city commissioner clearly made him a public official,"

two institutions, but the details are handled at each institution by an athletic association composed of faculty members and alumni, and each is incorporated to facilitate such business transactions as improvement of athletic grounds and equipment at the two institutions. The schedule of athletic contests for each year is approved by the faculty and by the Regents. The separate athletic associations at both institutions are wholly under the control of the Regents and are their agents. For further details of the athletic setup, see *Page v. Regents of University System of Georgia*, 93 F. 2d 887, 891-892. As was stated in the *Page* case, the "coaches" are also members of the faculty. [fol. 1467] Plaintiff Butts was Director of Athletics at the University. The Athletic Director, along with the various coaches in the Athletic Department, were employed by the separate incorporated athletic association. However, the defendant seeks by this motion to extend the category of "public officials" to one employed as agent by the University of Georgia Athletic Department. Even if plaintiff was a professor or instructor at the University, and not an agent of a separate governmental corporation carrying on "a business comparable in all essentials to those usually conducted by private owners"² he would not be a public officer or official. Under Georgia law, the position of a teacher or instructor in a State or public educational institution is not that of a public officer or official, but he is merely an employee thereof. *Regents of the University System of Georgia v. Blanton*, 49 Ga. App. 602(4); *Board of Education of Doerun v. Bacon*, 22 Ga. App. 72. To hold plaintiff, an employee of the University Athletic Association, a public official would, in this Court's opinion, be extending the "public official" designation beyond that contemplated by the ruling in the case of *New York Times Company v. Sullivan*, *supra*.

If it were conceded that plaintiff Butts was a "public official", the case of *New York Times Company v. Sullivan*

² See *Allen v. Regents of the University System of Georgia*, 304 U.S. 439, 451.

would not permit the vacating of this Court's previous judgment, as the ruling in the *Times* case does not prohibit a public official from recovering for a defamatory falsehood where he proves "actual malice"—that is, with knowledge that it was false *or with reckless disregard of whether it was false or not*. (Italics supplied.) In the trial of this case, there was ample evidence from which a jury could [fol. 1468] have concluded that there was reckless disregard by defendant of whether the article was false or not. See the Court's ruling on defendant's motion for a new trial dated January 14, 1964. *Butts v. Curtis Publishing Company*, 225 F. Supp. 916.

For the reasons stated above, the defendant's motions under Rule 60(b) to vacate the judgment entered against the defendant are denied.

This the 7th day of April, 1964.

Lewis R. Morgan, United States District Judge.

[fol. 1469]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed April 10, 1964

Notice is hereby given that Curtis Publishing Company, the defendant above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order of the Honorable Lewis R. Morgan, United States District Judge for the Northern District of Georgia, Atlanta Division, dated and filed on April 7, 1964, denying defendant's Motions under Rule 60(b) of the Federal Rules of Civil Procedure, to vacate the judgment entered in this case and to grant a new trial.

Welborn B. Cody, Attorney for Defendant.

Of Counsel: Kilpatrick, Cody, Rogers, McClatchey & Regenstein, 1045 Hurt Building, Atlanta, Georgia 30303, JA 2-7420.

Clerk's Certificate (omitted in printing).

[fol. 1471]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

No. 63-166

PAUL BRYANT, Plaintiff,

VS.

THE CURTIS PUBLISHING COMPANY,
a corporation, Defendant.

STIPULATION

It Is Stipulated and Agreed by and between the parties through their respective counsel that the deposition of Dr. Frank A. Rose, may be taken before Carmen Zegarelli, Commissioner, at the University of Alabama, Tuscaloosa, Alabama, on the 8th day of January, 1964.

It Is Further Stipulated and Agreed that the reading of and signature to the deposition by the witness is waived, said deposition to have the same force and effect as if full compliance had been had with all laws and rules of court relating to the taking of depositions.

It Is Further Stipulated and Agreed that it shall not be necessary for any objections to be made by counsel to any questions, except as to form or leading questions, and that counsel for the parties may make objections and assign grounds at the time of trial or at the time said deposition is offered in evidence, or prior thereto.

[fol. 1472] It Is Further Stipulated and Agreed that notice of filing of the deposition by the Commissioner is waived.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

No. 63-166

PAUL BRYANT, Plaintiff,

vs.

THE CURTIS PUBLISHING COMPANY,
a corporation, Defendant.

Tuscaloosa, Alabama
January 8, 1964

Before: Carmen Zegarelli, Commissioner.

Appearances:

Mr. William S. Pritchard and Mr. Winston B. McCall, of the firm Pritchard, McCall & Jones, Frank Nelson Building, Birmingham, Alabama, appearing for the Plaintiff.

Mr. James Runzer of the firm Pepper, Hamilton & Scheetz, 123 South Broad Street, Philadelphia, Pennsylvania; and Mr. Roderick MacLeod, Jr., of the firm Beddow, Embry & Beddow, 2121 Building, Birmingham, Alabama, appearing for the Defendant.

Mr. James J. Bennett, University of Alabama, Tuscaloosa, Alabama, appearing for Dr. Frank A. Rose.

[fol. 1473] I, Carmen Zegarelli, Court Reporter and Notary Public, State of Alabama at Large, Acting as Commissioner, certify that on this date as provided by the Federal Rules of Civil Procedure of the United States District Court and the foregoing stipulation of cotounsel, there came before me at the University of Alabama, Tuscaloosa, Alabama, beginning at 9:30 a. m., Dr. Frank A.

Rose, witness in the above cause, for oral examination, whereupon the following proceedings were had:

Mr. MacLeod: We have the usual stipulation, that it is not necessary to state objections except as to the form of questions, and any other objections can be made at the time the deposition is used at the trial?

Mr. Pritchard: We will so stipulate, except we reserve the right to object and seek a ruling by the court as to any question that we deem would be improper in a deposition at any time prior to the trial and including the time of trial.

Mr. MacLeod: All right.

Mr. Runzer: Has the witness been sworn?

The Reporter: Yes, sir.

DR. FRANK A. ROSE, being duly sworn, was examined and testified as follows:

[fol. 1474] Examination.

By Mr. Runzer:

Q. Dr. Rose, as you are aware, you have had your deposition taken at least once before and I am here to ask you a great deal of questions about some matters we are concerned with.

If you don't understand anything I say, or you don't hear me or you feel I am going too fast, I want you to tell me that and stop me, because we all have lots of time, although I understand that you have to leave at 1 o'clock for an appointment in New York. We have plenty of time, and we don't want you to get confused or misinterpret anything I say. I want you to stop me at any point if you don't feel it is clear to you.

A. Yes, sir.

Q. It is also understood that you are under subpoena for this deposition and because of a previous commitment, we will adjourn at 1 o'clock, and if examination is not complete, we will continue it.

Mr. Pritchard: We do not make any such agreement as that. We want you to complete your examination now.

Mr. Runzer: Off the record.

(Off the record discussion.)

Mr. Pritchard: Let's quit talking, all of this speech making, let's ask the questions and get the answers down, that's the purpose of the deposition, you know.

Mr. Runzer: Are you finished? I said it is understood [fol. 1475] that we will adjourn at 1 o'clock if we are not through, because you have a previous commitment, and meet again Wednesday of next week at this office at 10 o'clock; is that understood?

A. Yes, sir.

Q. And you are still under subpoena to appear here at that time, and place?

A. Yes, sir.

Q. Give us your full name, please?

A. Frank A. Rose.

Q. What does the A stand for?

A. Frank Anthony Rose.

Q. Your address?

A. President's Office, University, Alabama.

Q. Your home address?

A. President's Mansion, University, Alabama.

Q. And you are the President of the University of Alabama?

A. That's correct.

Q. And you have been since what year, sir?

A. Since September 5, 1957.

Q. And prior to your employment here, where were you employed?

A. President of Transylvania College at Lexington, Kentucky.

Q. What is your educational background?

A. I graduated from Transylvania College in 1942, and Transylvania Seminary in 1946, and did Graduate Work at the University of London in 1950.

Q. You are known as Dr. Rose, do you have a PhD Degree, sir?

A. No.

Q. Is that an Honorary Degree?

A. I have five Honorary Degrees from five Universities and Colleges.

[fol. 1476] Q. But, your only degrees are from Transylvania College and Transylvania Seminary, is that correct?

A. Yes, sir.

Q. Did you get any degree from the University of London?

A. No, sir.

Q. What type of work did you do at the University of London?

A. Graduate work in Philosophy.

Q. Now, you recall back in February, 1963, you received a phone call from the President of the University of Georgia?

A. Yes.

Q. You recall the date of that?

A. No, sir. It was a few days before February 24th, I believe it was. Let me check just a minute.

Q. Let the record show the witness is referring to a calendar book?

A. It was a few days prior to Sunday, February 24th.

Q. By a few, you mean two or three days?

A. I think it was more than that, because he wanted to meet on, I believe, on a Friday, and I couldn't meet on Friday because I had agreed to go to the Alabama Press Association Meeting in Montgomery on Friday, the 22nd. So, we agreed we would meet on Sunday, February 24th.

Q. Are you certain that he asked you to meet on Friday, the 22nd?

A. Well, he wanted to meet on another date and I am pretty sure that was Friday the 22nd. That is the reason I couldn't attend, because of my commitment, and it may have been he wanted to meet on Saturday, but I was going

over to Lake Martin with my family on Saturday, February 23rd.

[fol. 1477] Q. Where were you when you received this telephone call?

A. I was here in this office.

Q. And Dr. Aderhold state where he was?

A. No, he did not.

Q. I want you to tell me exactly what Dr. Aderhold told you that day?

A. I don't know that I could tell you exactly, but I can give you pretty much the meaning of the conversation.

Mr. Pritchard: I am going to interpose an objection there at this point that that is totally irrelevant and immaterial in this cause, and I want that to appear in the record.

Mr. Runzer: You certainly have the right to make your objection.

Mr. Pritchard: Thank you for your courtesy. Go ahead with your examination, if you will.

Q. Will you answer the question, please?

A. Yes. He called and asked if I could see him one day that week, and I think it was on either Friday or Saturday, but I think it was Friday, the 22nd.

I explained to him that it would be impossible because of commitments that I had, but I did inform him that I could see him on Sunday morning, February 24th. He said, well, that he would be over and meet with me in Commissioner Bernie Moore's office. I asked him what was the nature of the meeting. He said it was confidential, but that he would like to say that it might involve an ethical matter.

Q. Who suggested Mr. Moore's office as a place of the meeting?

A. He did.

[fol. 1478] Q. Did he indicate to you that Mr. Moore would be present at the meeting?

A. Yes, sir.

Q. Did he indicate that anyone else would be present at the meeting?

A. No, sir, he did not. It was my understanding that no one else was to be present.

Q. Is that something he told you or was that the understanding you carried away from the conversation?

A. When he said it would be a confidential meeting, it was my understanding that Commissioner Moore, Dr. Aderhold and I would be the only ones there.

Q. Did he ask you to bring anyone else to the meeting?

A. No.

Q. And gave you no indication of what it was except that it was an ethical matter?

A. That he would say it might be called an ethical matter.

Q. Have we now exhausted everything that you discussed in that telephone conversation?

A. Yes, sir.

Q. What time was the meeting set for?

A. 9 o'clock Sunday morning.

Q. Dr. Aderhold ever call you before to set up a meeting?

A. No, sir.

Q. So, this would be an unusual occurrence for you?

A. Yes, sir.

Q. Now, the meeting was held where?

A. Was held in Commissioner Moore's office in the Redmont Hotel.

Mr. Pritchard: It wasn't there, was it?

[fol. 1479] Mr. Runzer: Just a moment. It is only fair if you don't know a specific fact or don't remember, it is agreeable for you to say so.

A. Wherever Commissioner Moore's office is, I think it is the Redmont Hotel.

Q. In Birmingham?

A. Yes, sir.

Q. Between the day of the telephone call and the time of the meeting, did you discuss Dr. Aderhold's phone call with anybody?

A. No, sir.

Q. When did you leave Tuscaloosa to go to Birmingham for the meeting?

A. I left about 7:30 Sunday morning, February 24th.

Q. Did you drive down there?

A. Yes, sir.

Q. Drive yourself or someone go with you?

A. I think I drove myself.

Q. And did you go straight to the meeting?

A. Yes.

Q. And who was present when you arrived at Commissioner Moore's office?

A. When I first arrived, no one was present. I went down and sat down in the lobby and waited and then Commissioner Moore came in and I waited until he had time to open up his office and then went up and just a few seconds after I arrived there, Dr. Aderhold and Mr. Cook Barwick came into the meeting.

Q. Just a moment.

Let's go back a moment. You were in the lobby and Commissioner Moore came in?

A. Yes, sir.

Q. Did you have any conversation with him in the lobby?

A. No.

[fol. 1480] Q. Did he see you?

A. No, I don't think so.

Q. You waited a few moments for him to open his office?

A. That's right.

Q. What floor is his office on?

A. I can't recall.

Q. Is it upstairs?

A. Yes, it is upstairs.

Q. Did you ride up on the elevator with him?

A. No; I rode up on the elevator by myself.

Q. You went in, and sat for a few minutes; you said for a few minutes you and Commissioner Moore were there by yourselves; is that correct?

A. No. By the time I got my hat and coat off, Dr. Aderhold and Mr. Barwick came in.

Q. In the interval before Dr. Aderhold and Mr. Barwick arrived, did you have any conversation whatsoever with Mr. Moore?

A. I may have had conversation, but as far as talking about this matter, it wasn't discussed until Dr. Aderhold and Mr. Barwick came in.

Q. Do you recall now what that conversation with Mr. Moore was?

A. No, sir.

Q. All right.

A. I am not even sure that there was a conversation.

Q. Now, I assume then Dr. Aderhold and Mr. Barwick also took their coats and hats off?

A. Yes.

Q. And does Mr. Moore's office have an outer room and inner room?

A. Yes, sir.

Q. And did you proceed from the outer room into the inner room?

[fol. 1481] A. Yes, sir.

Q. Was there any conversation in the outer room at all prior to the meeting?

A. I don't recall. There may have been greetings, but I am sure that's all there was to it.

Q. Now, all four of you went into Mr. Moore's inner office?

A. Yes.

Q. Is that his personal office, do you know?

A. Yes.

Q. As opposed from the secretary's office?

A. Yes.

Q. Now, did Mr. Moore sit in his usual seat behind his desk?

A. I am not sure. I think he sat over to the side of his desk.

Q. Did Mr. Barwick and Dr. Aderhold sit together?

A. Yes. Well, they sat adjoining one another over to the side. I sat directly in front of the desk and took notes from the outside of the desk. Commissioner Moore, I think, was sitting over here (indicating).

Q. That would be in the left side of the desk as you face it?

A. I am sorry, I can't tell you all of those details. He would have been in my left.

Q. And Dr. Aderhold and Mr. Barwick would have been to your right?

A. Dr. Aderhold sat over there and—

Q. And also would be to your left, sir?

A. To my left (indicating).

Mr. Runzer: Off the record a minute.

(Off the record discussion.)

Q. All right, continue please.

[fol. 1482] A. Mr. Barwick sat next—between Dr. Aderhold and me.

Q. Now, who opened the meeting?

A. I believe that the first thing that was said was Commissioner Moore informed all of us that he had received a telephone call from Mr. Furman Bisher, one of the Sports Writers of one of the Atlanta papers telling him that he knew of the meeting and would like to be informed after the meeting was over of our discussion that we had had. And Commissioner Moore asked how he knew of the meeting and he did not comment.

And, at that time, I looked at Dr. Aderhold, because it had been my feeling that it was a confidential meeting and Dr. Aderhold, I think, may have been a little surprised about it, too. And, Mr. Cook Barwick said, I am sure that the finger must point to me, as I represent Mr. Furman Bisher as his personal attorney, but I do not represent him in the case for the Saturday Evening Post. This had to do with the first suit that Coach Bryant had filed against the Saturday Evening Post and Mr. Bisher for an article

under the title of Speaking Out or something to that effect, that the Saturday Evening Post carried. And this upset me a great deal, because we had had over problems with Mr. Bisher and he had written some very difficult things about the University of Alabama and made some insinuations that were unjust and this disturbed me that he would know that we were going to be in this meeting, which Mr. Cook Barwick assured all of us that he had not discussed this meeting with Mr. Bisher.

Q. Now, at this point, am I correct in assuming that you still did not know what the subject matter of the meeting was?

A. No, sir.

Q. You say no, sir; you mean that I am correct in saying that?

[fol. 1483] A. I did not know what the subject of the meeting was; yes, sir.

Q. What was the next thing that was said?

A. Then, I believe that Dr. Aderhold proceeded to inform me the purpose of the meeting.

Q. What did he tell you, sir?

A. Well, I can give you, in essence, what he said to me, and that was that there had been a telephone call to Coach Bryant from Coach Butts in which it had been overheard by a man by the name of Burnett in which Coach Butts had given to Coach Bryant some of the plays and pattern plays of the University of Georgia prior to the Alabama-Georgia Football Game in September, 1962. And, that they had talked with Mr. Burnett about the matter and felt that Mr. Burnett was telling the truth. I was led to believe either by word or by insinuation that Mr. Burnett was a reputable man. There was no doubt that he had heard everything that they had told me regarding plays, two or three players, and other things relating to the game.

Q. Let me stop you there for a moment. What was your personal reaction upon hearing this?

A. Well, I was tremendously shocked and greatly disturbed because I had a lot of confidence in Dr. Aderhold.

I had a lot of confidence in just meeting Mr. Cook Barwick and being—although I must say I had some reservations about him after he informed me of his relationship with Mr. Furman Bisher and the fact that Furman Bisher knew about the meeting that we were having.

Q. Now, is it at his point that you began to take notes as you told us before?

A. I began to take notes when Dr. Aderhold began talking.

Q. Do you still have a copy of those notes?

A. No, sir, I do not.

[fol. 1484] Q. Now, going back a moment. You say you have given us the essence of the conversation because I assume you don't recall the exact words at that time?

A. No, sir, and I don't think any man could.

Q. All right.

Well, trying to distill it down, would it be fair to you to say that you were told that it had been overheard that Mr. Butts gave Mr. Bryant information about the Georgia team which might have been of some value in preparing for the Georgia-Alabama game?

A. That's right.

Q. And as you said, you were shocked or stunned by this information?

A. Yes, sir, very much so.

Q. Did Dr. Aderhold or Mr. Barwick go into any of the details of the exact information that was allegedly passed?

A. Yes, sir. They gave me essentially the information that I read later in this Saturday Evening Post article.

Q. Have you ever compared the so-called Burnett notes with the information that was given you by Dr. Aderhold and Barwick that day?

A. No, I haven't.

Q. Are you generally familiar with the contents of the Burnett notes?

A. Yes, sir.

Q. And would it be fair to say then that the information they gave you paralleled the information that is contained in the Burnett notes?

A. Pretty much and a little bit more.

Mr. Pritchard: I want to here and now object to the attorney using the statement the information which they gave him when, as a matter of fact, it was merely statements [fol. 1485] they made to him, and not information but merely statements that they were repeating that they had heard from someone rather than the term information, because there is no information about it. In my opinion I think that was misleading and improper.

Q. Now, I think he was saying that the information that was being passed to you by Dr. Aderhold and Mr. Barwick was a little more than was contained in the Burnett notes; is that correct?

Mr. Pritchard: I renew my objection to the use of the word information. It was merely hearsay of the purest type, it is a matter of hearsay rather than information.

Q. Would you go ahead and answer?

A. Yes, sir. Either Dr. Aderhold or Mr. Cook Barwick said that it appeared to them from the statement that they had that this was going to be a scandal that was much larger than the Black Socks Scandal.

Q. And by that I assume they were referring to the 1919 baseball scandal?

A. I suppose that was it.

Q. All right.

A. And that Mr. Barwick was in a lawyer's office in Atlanta a few days after talking with Mr. Burnett and that Furman Bisher and young Roderick Beddow came into the office and stated that they understood that there was a check, a photostatic copy of a check in the amount of \$10,000.00 written by Paul Bryant to a gambler in which he supposedly bet on a football game. And I made inquiry as to what game that could have been, and Mr. Cook Bar-

✓

wick explained to me that it was the Georgia Tech-Alabama Football Game of 1962, in which we lost that ball game by one point. I asked—

Q. You say we, you refer to the University of Alabama? [fol. 1486] A. University of Alabama.

Q. All right.

A. And I asked how that could be, and he said, well, Coach Bryant could have ordered his quarterback to call a field goal play rather than a passing play in which the ball was intercepted.

Q. This information that we were just discussing, namely this information relating to the Georgia Tech Game was not part of what Mr. Burnett was supposed to have overheard?

A. That is true.

Q. Now, do you remember whether Commissioner Moore said anything during this meeting?

Mr. Pritchard: That's the purest form of hearsay and I think it is a pure waste of time and money to attempt to examine a witness about—

The Witness: I don't know whether—

Mr. Runzer: I— Just a moment, Doctor. Unfortunately, as good a reporter as Mr. Zegarelli is, I don't believe he can get more than one at a time.

Mr. Pritchard: I object. It is the purest form of hearsay.

Mr. Runzer: I might add it is for the doctor's accommodation that if you wish to make a continuing objection, you certainly have the right to make any objection you want to.

[fol. 1487] Mr. Pritchard: I propose to exercise it too, so go ahead.

Mr. Runzer: Would you read the question, please.

(Question read.)

Q. Doctor, would you answer that question?

A. I do not recall what he said, but we all discussed the points that had been raised and talked about, including Commissioner Moore.

Now, did you take notes of the specifics of the information that was supposedly overheard by Mr. Burnett?

A. Yes, sir. I would say that I had about four small pages of notes contained in about four or five points that they had specifically raised which I used in my discussion with Coach Bryant when I met with him to talk to him about the accusation.

Q. Let me digress for a moment, Doctor.

Do you have any background in football at all?

A. Just sandlot football.

Q. By that, you mean you played sandlot football?

A. Yes, sir.

Q. Have you ever coached a football team?

A. Yes, sir, at one time during the war they couldn't get a coach at this high school nor an acting principal nor a dramatic coach, and I assumed all of the roles. But, I don't believe that I won but one ball game.

Q. What was the name of the high school?

A. Nicholasville High School, Nicholasville, Kentucky.

Q. How many years did this situation go on?

A. I believe—let me see. That would have been two or three years; I am not sure, may have been a little longer.

Q. This was during the war years?

A. Yes, sir.

[fol. 1488] Q. That would be in the early 40's?

A. No, sir. It would have been in the middle 40's, I believe. I think it was 1943 to 1945, or 6, somewhere right in there.

Q. And in an effort to perform this role, did you try to educate yourself in this new business?

A. Yes, sir. I tried to, but I couldn't do it. I had to rely on some of the Alumni of the school and the former coach who had to give up the job because he had additional duties, he worked out the formations for me, and the boys explained to me what they were the year before. There were only 75 boys in the high school, and they wanted to play and the superintendent of schools asked me if I would

supervise it. They weren't interested in winning, they were just more interested in having recreation.

Q. Excuse me.

Was the name of that Nicholasville?

A. Yes, sir. I believe it has been changed to Jessamine County.

Q. Spell that.

A. J-e-s-s-a-m-i-n-e.

Q. That's in Tennessee?

A. No, in Kentucky.

Q. Excuse me, Kentucky.

A. Nicholasville, Kentucky.

Q. All right, Doctor.

One other question while we are digressing.

Have you ever, during the course of this event which would date sometime from the middle of February, 1963, to date, retained either Mr. McCall or Mr. Pritchard, as your attorney?

A. Well, I have talked to them on many occasions and received counsel from them. I haven't formally retained them, but I have used them as my counsel.

[fol. 1489] Q. Now, how long did this meeting on the 24th last?

A. I would have to guess, sir. But, I would say about an hour and a half, to two hours.

Q. And have we exhausted the subject matter of that meeting?

A. As much as I recall, and as well as I recall.

Q. Now, you made a statement over in Atlanta when you testified that this matter was one of the most disturbing things that had ever occurred to you in College Administration?

A. Yes, sir, it was.

Q. And that is a true statement?

A. Yes, sir.

Q. And coupling that with your remark of a few moments ago that you were upset and stunned, I assume this was a matter of great information to you?

A. Yes, sir.

Q. Now, did Dr. Aderhold say or Mr. Barwick say why they were informing you of the information?

A. Well, they wanted Dr. Aderhold and wanted me to co-operate with them on making an investigation of the matter and we agreed that I would and that they would continue and that we would share information that we obtained from time to time.

Q. Then, would it be fair to say that you were asked to conduct an investigation from the point of view, from the geographical point of view from the University of Alabama?

A. I don't know that I was specifically asked to conduct an investigation, but it was expected that I would.

Q. And did you indicate that—

A. And understood that I would, and I indicated I would.

Q. In other words, regardless of whether it was a request made of you, it was agreed among the group that you would conduct an investigation here in Tuscaloosa?

[fol. 1490] A. Yes, sir.

Q. And part of your investigation would be to find out whether Coach Butts had given any significant information to Coach Bryant for the Georgia-Alabama Game; is that correct?

A. That is true; yes, sir.

Q. And that is what you set about to do when you left the meeting?

A. Yes, sir.

Q. And did you state any concrete steps to this group that you would take in conducting this investigation?

A. No, sir, I did not, not that I recall.

Q. Let's try to test your memory a moment.

A. We may have—no, sir, I don't believe that we did.

Q. Did you say that you would discuss it with any specific individual in the University Administration?

A. No, sir, but I think this was understood that I would talk to people about it.

Q. Would you say that it was understood or did you say that you would?

A. No, sir. I just told them that I would look into it and let them know.

Q. Did you say that you would discuss it with the University Attorneys?

A. No, sir.

Q. Are you certain about it?

A. I am not positive, but I can't imagine that I would say that. I don't see the reason at that time for saying that.

Q. Now, where did you go—strike that.

Did you leave first from the meeting?

A. Yes.

Q. All right.

A. We thought it would be best, because if we all did leave together in the event that a newspaper reporter might see us, he would begin to ask questions about it.

[fol. 1491] Q. And I assume, during the course of this meeting as you indicated, you asked questions about things, about this material?

A. Sir?

Q. You asked questions of Dr. Aderhold and Mr. Barwick?

A. Yes, sir.

Q. Were you told that Mr. Burnett had taken a lie detector test?

A. I believe that I was told that at that meeting. If I wasn't told that at that meeting, I learned it later.

Q. You don't recall whether you learned it at that meeting or not?

A. I think I did learn it at that meeting.

Q. When you learned he had taken a lie detector test, did they also tell you that he had passed the lie detector test?

A. Yes. When I learned of the lie detector test given Mr. Burnett, I was told that he had passed it.

Q. Were you also told at this meeting that he had given an affidavit as to this information?

A. I don't recall, sir.

Q. Now, it was agreed then that you would leave separately so as to throw any newspaper man off the scent?

A. Yes, sir.

Q. Did you go directly back to Tuscaloosa?

A. Yes, sir.

Q. What time did you arrive back there?

A. I would say sometime between 12 and 1 o'clock.

Q. Now, during the course of this meeting, did you indicate that there would be some difficulty in your doing something in that coming week because of other commitments?

A. Yes, sir. I told them that I had to be in Washington and New York and Chicago for a meeting. Dr. Aderhold [fol. 1492] stated that he too was supposed to go to the meeting in Chicago, and that it was agreed that as soon as I got some information that I would share it with him and he would share information that he had with me.

Q. Did you make any remarks as to the whereabouts of Coach Bryant during this meeting?

A. I don't recall.

Q. Well,—

A. I didn't know what his schedule was and I didn't know whether he was here or whether he was away.

Q. So, then, you couldn't have made a remark as to where he was?

A. Sir?

Q. You couldn't have made a remark as to where Coach Bryant was?

A. It may be that I could have, yes, sir. It may have been at that time that I knew where he was. I just don't recall.

Q. You don't recall?

A. No, sir.

Q. Now, you drove straight home and got in Tuscaloosa some time around 12 or one o'clock; is that right?

A. Sometime between 12 and 1 o'clock.

Q. Am I also correct that during this meeting you were never shown the so-called Burnett notes?

A. No, sir.

Q. What did you do when you got home?

A. Well, I was so upset about the matter that I went upstairs and sat down and thought about it for awhile, and then my wife called me down to lunch and I went down and had a very light lunch and went back up and thought about it some more.

Then I decided the best thing for me to do was take a nap and then think about it when I was more refreshed and relaxed.

Q. And did you do that?

[fol. 1493] A. Yes, sir.

Q. All right.

A. After taking a tranquilizer and I slept for about an hour.

Q. Excuse me.

Is it your custom to take a tranquilizer?

Mr. Pritchard: We object to that. My gracious sakes alive, we are here to try a lawsuit.

Mr. Runzer: Let me finish the question, please.

Mr. Pritchard: I am going to object to the pure waste of time.

Mr. MacLeod: You have your objection.

Mr. Runzer: The question is not over yet, with all due respect to you, Colonel Pritchard.

Mr. Pritchard: I object on the grounds the question is incompetent, irrelevant, immaterial, as to whether or not he took a tranquilizer before or after he took his nap, or if he took them on any other occasion. I want to say it is merely a waste of time in an effort to get into the record testimony that has no bearing on the issues to be tried in this case.

Mr. Runzer: Do you make any objection—

[fol. 1494] Mr. Pritchard: That's my objection in the record, please.

Mr. Runzer: I am sure he has gotten it down.

Q. Doctor, I will finish the question.

Did you take a tranquilizer because of the upsetting nature of this news, or is it your custom to do that?

A. Because of the upsetting nature of the news.

Q. You answered the question, thank you, Doctor.

I assume when you awoke you began to think about this matter again?

A. Yes, sir. I thought about it from about 2:30 to 3 o'clock until about 5 and I thought of it from every angle that I possibly could. I thought about the people that I should see first, and by 5 o'clock came to the conclusion that the thing for me to do is confront the man that had been accused.

Q. That was your final conclusion of this thought process; is that correct?

A. Yes, sir.

Q. Would you run down for me in brief fashion exactly what your thought process was. You said you considered whom you would consult with, who are you speaking of?

A. Well, on most of the problems that arise at the University, I talk with Mr. Jefferson Bennett, the Administrative Vice-President of the University.

Q. And this is the gentleman that is seated to my right here?

A. Yes, sir.

And I usually, in athletic matters, usually consult Mr. Jefferson Coleman, who was former business manager of Athletics at the University, and who is now Director of Alumni affairs. I usually consult Mr. Ernest Williams who is a member of the executive committee of the Board of [fol. 1495] Trustees. And I felt, in this situation, after thinking it through, that I owed it, a thing of this serious a nature, to talk to the man that had been accused first.

Q. What, in your mind, was Coach Bryant accused of at this point?

A. In my mind he was accused of having received information from Coach Butts that would affect the outcome of the University of Georgia-Alabama Football Game.

Q. And this was an accusation that you were setting out to investigate?

A. Yes.

Q. Now—

A. And it was insinuated either consciously or unconsciously on the part of Mr. Barwick and Dr. Aderhold that it might be a great deal more serious than the receiving of information that might affect the outcome of the ball-game.

Q. Now, if you will tell me, did you then proceed to get in touch with Mr. Bryant?

A. Yes, sir. I called Mr. Bryant around 5 o'clock.

Q. Where did you reach him?

A. At home and told him that I would like to have him meet me in my office at 7 o'clock. He told me that he would be glad to do so and he came to my office at 7 o'clock.

Q. Let me stop you there a moment.

Did you give him any indication as to why you wanted to meet him?

A. No, sir.

Q. You said, just meet me at 7 o'clock at my office?

A. Yes, sir.

Q. And he said he would?

A. Yes, sir.

Q. Up to this point, how would you describe your relationship with Mr. Bryant, a friendly one?

[fol. 1496] A. Yes, it is a friendly relationship; however, it is the same relationship that exists between me and all of my staff members, personal relationship.

Q. There is a personal relationship?

A. Yes, sir.

Q. Now, he came to your office at 7 o'clock?

A. Yes, sir.

Q. By your office, you mean the room we are seated in right now?

A. Yes, sir.

Q. Now, between the time you left the meeting and the time that Coach Bryant arrived here, did you discuss the matter with anyone else?

A. Yes. I believe that I told my wife what Dr. Aderhold and Mr. Barwick had told me, and I believe that I discussed with her the people that I should talk with first and it was also her thinking that I should talk to the man first that had been accused.

Q. But, outside of your wife, you had discussed the matter with no one before the meeting with Coach Bryant?

A. No, sir.

Q. Now, the two of you were alone in this room?

A. Yes, sir.

Q. Was anyone in the outer office?

A. No, sir.

Q. Did you sit in the chair where you are sitting right now?

A. Yes, sir.

Q. That's the one behind the desk?

A. Yes, sir.

Q. Where did Coach Bryant sit?

A. He sat on my left where Colonel Pritchard is sitting facing me. Over on my right facing me, I get confused; I am lefthanded.

[fol. 1497] Mr. Runzer: Off the record.

(Off the record discussion.)

Q. So, Coach Bryant sat at the corner of the desk at your right?

A. Yes, sir.

Q. And at this time, did you have in your possession the notes that you had made?

A. Yes, sir.

Q. Who opened the meeting?

A. I did.

Q. What did you say?

A. I tried, as best I could, to relate to him the information or statements that Dr. Aderhold and Mr. Cook Barwick had given to me regarding his conversation with Coach Butts.

Q. Did you start off by giving it in conclusion form or did you give it—give him the specifics of information that was supposedly passed?

A. I don't recall, but I believe that I gave him the points that I had taken down of what I had considered the essence of the meeting and related it to him as best I could, the story from the beginning to the end as it had been given to me.

Q. Now, during this initial remark by you, did you tell him that he was accused of receiving information from Mr. Butts that could affect the outcome of the Georgia-Alabama Game?

A. Yes, sir.

Q. Did he allow you to talk interrupted—uninterrupted, excuse me?

A. Well, at each point I would ask him questions about it. I wanted to know if he had talked to Coach Butts, what was the nature of the conversation, and then I went down each point talking to him about that.

[fol. 1498] Q. Did you tell him first then that he was accused of receiving information that could affect the outcome of the game?

A. Yes, sir.

Q. Did he make any remark when you said that?

A. He was tremendously shocked and upset about it, too, and asked me to go ahead and tell him everything that had been said, and I did. And then, we discussed it point by point after that.

Q. Just so that it is clear in my mind, the first thing you told him he had been accused of receiving information from Mr. Butts that could affect the outcome of the football game; is that correct?

A. I don't know what it was exactly in that manner, sir. I did reveal to him that Coach Butts supposedly called him and called him from off of the football field and gave him information about the University of Georgia.

Q. And this was about the first thing that you said to Mr. Bryant in this office that night?

A. Yes, sir.

I got down to it rather quickly.

Q. And then, although he was shocked, he asked what was the nature of the information he was supposed to have received; is that correct?

A. Yes, sir.

Q. And then you discussed—went through the points you had taken notes of at the meeting that morning; is that correct?

A. Yes, sir.

Q. When you finished going through the points, did he let you go through them without making any remark or did you stop on each one?

A. I don't exactly recall. I think that we discussed the overall accusation. He said that he had talked to Coach Butts on many occasions on many subjects as he did to [fol. 1499] many coaches, those with whom he played on his schedule, and those whom he didn't play.

Q. Did you ask him whether he had—whether he had received a phone call from Mr. Butts on September 13th 1962?

A. Yes, sir.

Q. What was his answer to that question?

A. He said he didn't know, but he would be glad to look it up, that he come to him several times in the last—during that period and he talked to several other coaches during that period, but that he was sure that his record or telephone bills would show whether he had talked, and he would be glad to look it up on that specific date.

Q. Just so we are perfectly clear, we are talking about a call on September 13th, when Mr. Butts called Mr. Bryant. Did he say his records would show that?

A. No. I believe that had to do with his call that he was supposed to have made back to him.

Q. That's what I had thought, you had misunderstood my question.

My question is, did you ask him whether he had received a call from Mr. Butts on September 13th, 1962?

A. He did not specifically remember that call though he did say that Wally Butts had called him and that he had

called Wally Butts and that they had talked on several occasions about many things. But, he did not specifically remember that call.

Q. Did you also, in the course of this meeting, ask him if he had called Mr. Butts on September 16th, 1962?

A. Yes, sir.

Q. What was his answer?

A. And he did not recall whether he had made that call or not, but stated that he could have made the call; that there had been several calls made to Coach Butts and [fol. 1500] to other coaches and that he could look that up and find out whether he had made that call or not.

Q. That was the call he was going to check on his telephone bill record?

A. Yes, sir.

Q. The September 16th call?

A. Yes, sir.

Q. Did you discuss with him the specific points that Mr. Burnett was supposed to have overheard?

A. Yes, sir.

Q. Do you remember what any of those points were?

A. I will try to recall them to the best of my ability. There has been quite a bit of time that has gone by.

Q. Yes, sir.

A. And I try—these were the points that Dr. Aderhold and Mr. Barwick had raised, and this was what I was trying to do in my letter, to the best of my ability to interpret.

Q. Did you take notes of your meeting with Coach Bryant?

A. Yes, sir. I took a few notes down on the notes I had taken up there.

Q. Of course, they are also gone now?

A. Yes, sir.

Q. Now, proceed; you were telling us what you were saying?

A. He said that they could have talked about many things, one that they talked about primarily was—that he had talked to him about a great deal about the inter-

pretation of new football rules, that he was concerned about that. Neither he nor his staff fully understood the rules. He stated that they could have—

Q. Let me stop you at each point, sir.

I think it would be more orderly if I did. You say that [fol. 1501] Mr. Bryant said that they could have talked about rules or rule interpretations; is that correct?

A. Yes, sir.

Q. I want you to be sure, in your own mind, did he say they could have talked about that?

A. Yes, sir.

Q. Or did talk about it?

A. No, sir. He said that they could have, and he was sure that they had from time to time discussed it. He said that he was greatly concerned about some of the interpretations, and that Coach Butts had been on a National Rules Committee and that he wanted to get from him as much as he could about some of these things. He said—he was trying to interpret for me the telephone call, if he had made one back, you see, or if Coach Butts had called him, that they could, at that time, have talked about Continental Enterprises.

Q. Let me stop you one minute. Let's try to stick to the rule changes or interpretations?

A. Yes, sir.

Q. Is it correct that they could have talked about it, not that they did talk about it?

A. On these specific telephone calls?

Q. That's right.

A. Yes, sir.

Q. Did he not say on the 13th of September, 1962, or 16th of September, 1962, that we did discuss rule interpretations?

A. No, sir, but they had discussed them during recent time, during that period there.

Q. This was presented to you as a possibility, as something that could have been discussed during the so-called telephone conversations?

A. Along with several other things.

Q. I understand that. We are dealing with one at a time. [fol. 1502] Mr. Bryant said this is one of the things that could have been discussed?

A. Yes, sir.

Q. What is the next thing that could have been discussed?

A. Could have discussed Continental Enterprises in which he had some stock and that I believe he said he had made some money and that he had lost some money on this stock and that Coach Butts probably was closer to it or knew more about it than he did and this was one of the things they could have talked about, because they had discussed this within a period of time during that time period.

Q. Did you—

Mr. Pritchard: Please, don't interrupt the witness. Go ahead, Doctor.

A. He said they could have talked about the tickets because Georgia had not sold all of the tickets they had to the football game, and that he needed tickets and was very much interested in selling all of the tickets to the game. I think this pretty much was some of the things he said they could have discussed.

Q. Now, did Coach Bryant deny to you that he had ever received any information about Georgia Football from Mr. Butts?

A. Specific techniques or plays?

Q. You told him that he was accused of receiving information from Mr. Butts about Georgia Football that could affect the outcome of the game?

A. The 1962 team?

Q. That's correct.

A. Yes, sir.

Q. Now, did he deny that?

A. Yes, sir.

[fol. 1503] Q. What were his words?

A. He said that's ridiculous.

Q. Now, you say then that he said they could have talked about rule changes, Continental Enterprises, and ticket sales; is that correct?

A. Yes, sir.

Q. Now, how long did this meeting take?

A. Lasted about three hours.

Q. All right.

A. And I asked him many, many questions, every question that I could possibly think about that would have any bearing on the telephone call that Coach Butts supposedly made to him and that he supposedly made to Coach Butts.

Q. Did you ask him if he and Mr. Butts ever discussed any football plays?

Mr. Pritchard: That's repetitious. We have been over it at least—the record will bear me out, we have been over it at least three times, and it is a useless waste of time to ask him the same question three times. I object, it is purely repetitious and a waste of time.

Mr. Runzer: Your objection is in the record. Would you please answer the question? Read the question, please.

(Question read.)

A. Of the 1962 Georgia team?

Q. No, just any football plays?

A. Yes.

Q. What did he say?

A. He considered himself one of the best defensive football coaches in America and he considered Coach Butts one of the best offensive coaches in America, and that on many [fol. 1504] times that he had shared defensive techniques with Coach Butts as Coach Butts had shared offensive techniques with him, just as he had the same discussions with Bud Wilkerson of Oklahoma and Coach Royal of Texas and other coaches and he named others that I have forgotten.

Q. Am I correct in saying that he said he did discuss football plays with Coach Butts?

A. Not in the telephone conversation, the plays of the Georgia 1962 team. He stated in that that he was concerned about some of the rule interpretations that had been raised at the meeting of the coaches of the Southeastern Conference sometime during the summer in Birmingham, and the statements that had come to him that Mr. Gardner had informed the officials to watch some of the techniques of some of the teams in the Southeastern Conference, including the University of Alabama, that he was primarily concerned with such things as Butt blocking and Head blocking, and that Coach Butts probably knew more about the interpretation of these things than anybody else, and that he knew that he had several discussions with Coach Butts on this.

Q. Now, my question, Doctor, is, did he admit that he discussed offensive plays with Mr. Butts?

A. No, sir.

Q. He did not admit that?

A. No, sir.

Q. Did you raise with him the point of information the notes that a player named Woodward committed himself too quickly?

A. I asked him—I told him that I had in my notes that Dr. Aderhold and Barwick said that this was supposedly discussed and he said he knew nothing about this. I said, well, could you try to explain to me what it would mean and he tried to explain to me what it would mean. But, he knew nothing about any individuals or anything that had to do [fol. 1505] with that. But, he said that in explaining some kind of technique they could have talked about movements of players but he said as far as any specific individuals, no.

Q. Now, my question is, did you ask him whether he heard Coach Butts say that Woodward commits himself too quickly?

A. He said he did not.

Q. He did not?

A. Yes, sir.

Q. You certain that is what he said in response to that question?

A. Yes, sir.

Q. Did he ever indicate that he didn't understand the use of the phrase, Woodward commits himself too quickly?

A. Let me put it this way. I don't recall exactly what he said, but he did not recall any names or any discussion of that. But, he did try to explain to me on my further questions what it would mean.

Q. In other words, he did understand what the use of the term, Woodward commits himself too quickly means?

A. Yes, but he didn't recall that there was ever any discussion.

Q. I understand he didn't say it was discussed, but he did understand what the term, Woodward commits himself too quickly means?

A. Yes.

I think he would understand what anyone committing himself—I mean, he said to me, specifically, that no names could have been discussed, because he didn't even know anything about the name.

Q. I understand that, but he did tell you that he did understand what that term meant, that Woodward committed himself too quickly?

A. Yes, sir.

[fol. 1506] Q. Now, did he give you any explanation as to why he might have called Mr. Butts back on the 16th?

A. He said that the only reason that he could, and he didn't recall that he had called him back, that he could have called him back, would have been that Coach Butts did not understand some of the questions that he was raising, and was to try to think about it or find out what he was talking about, and that he was to try to get in touch with him; but he didn't recall whether that had been done, or whether that was it or not.

But, he did say that there was some things they had talked about or could have talked about that he did not understand.

Q. And these things concerned what?

A. Concerned rule interpretation.

Q. Did he ever say—

A. New rule interpretation.

Q. Did he ever tell you that he called Butts back because Butts was going to check on a play that Butts had used?

A. He didn't say that specifically, but he did talk about the techniques, the interpretation of the techniques.

Q. Did he ever tell you that he called Butts back because Butts was checking on information about a play that Butts had used in the past?

A. He didn't use the word play. This was my interpretation of it, but he did talk about the techniques.

Q. In other words, he did not say that he called Butts back to get information about a play that Butts had used?

A. No, sir.

Q. Are you saying no, he did not say that?

A. No, he did not say that specifically.

Q. Did he tell you—excuse me.

In the course of this conversation, I assume Mr. Gardner's visit was also discussed?

[fol. 1507] A. Yes, sir.

In fact, he was the one that told me about it, Mr. Gardner's visit.

Q. That is, Mr. Bryant is the one that told you about that?

A. Yes, sir.

Q. Up to that point, until he told you, had you known that Mr. Gardner had been here?

A. No, sir.

Q. All right.

A. And there was no reason for me to know that Mr. Gardner had been here. Coach Bryant did tell me that he had gotten permission from Commissioner Moore to ask Mr. Gardner to come here and that Commissioner Moore said that he could have that permission to do it, and that the Southeastern Conference or Commissioner Moore's office would pay his expenses for the visit.

Q. Did he tell you, during the course of this meeting, that he changed his defensive techniques as a result of these conversations with Gardner and Butts?

A. Yes, sir; but he said that he and his coaches still were not clear on some of the interpretations of the new rules regarding the techniques, but that they had done the best that they could and that they sat around tables and drawing boards and that Mr. Gardner went over several of these things and that they still were not completely clear on it, but were most anxious that we not have any problems which we had had with Georgia Tech in 1961.

Q. But, you say he did tell you that as a result of talking with Mr. Gardner and Mr. Butts, he did change his defensive techniques?

A. Yes, sir, that he had made some changes in his techniques that would have penalized the Alabama team.

Q. And these were defensive techniques?

A. Yes, sir.

[fol. 1508] Q. And these changes were made as a result of his conversation with Mr. Gardner and Mr. Butts?

A. And the meeting in Birmingham of the Southeastern Conference Coaches where this was discussed, which Commissioner Moore informed me that Coach Bryant asked more questions than all the other coaches, because he was really concerned about it, and this was the reason he consented to have Mr. Gardner come because he did not want Alabama to get any adverse publicity on penalties.

Q. Did he tell you when he made these changes on defensive techniques?

A. No, sir.

Q. Did he tell you that he had learned anything different and changed his techniques from Coaches Gardner and Butts?

A. I would say if he made changes, he did. He didn't specifically say that, but that was the interpretation I got.

Q. In other words, from what he said, you understood him to say that he did learn something from Gardner and Butts that made a change in his defensive techniques?

A. Yes, sir.

Q. Did he say that in talking to Mr. Butts that it prevented Alabama from being penalized?

A. Not that I recall.

Q. Did he say that as a result of talking with Mr. Butts he got information that favored Alabama?

A. I asked him that question, and he said that he may have, but he doubted it seriously.

Q. He said that he may have, but that he doubted it seriously?

A. Yes, sir.

Q. Is that his exact quote, as you recall it?

A. Well, I don't know that that is his exact quote, but this is my interpretation.

[fol. 1509] Q. Did he say that the visit of Gardner and his conversation with Butts prevented him from using illegal plays?

A. Yes, sir.

Q. During the course of the conversation, did he say that if Lee Roy Jordan had been expelled from the game, he might have lost that football game?

A. He used that as an illustration. This was the illustration that he used.

Q. Tell me what he said. What was the illustration?

A. I asked him to try to explain to me just what he was talking about in our defensive techniques and interpretation of the rules and he tried to explain to me what it might have meant if Lee Roy Jordan butt blocked or head blocked. Now, I still don't know what that means.

Q. In other words, he did say to you that if Mr. Jordan had been expelled from the football game, it could have cost Alabama the football game?

A. He said it could have. I don't know if he specifically put it in that way, but that was the interpretation that I put on it, and I think most of us that knew the team that Alabama had at that time, if we lost the best defensive man that we had on the team, that we would have been in serious trouble.

Q. Now, did he say that they discussed what could happen with the offensive plays of any school and the defensive plays of Alabama if they were illegal?

A. I don't recall specifically his just making that pointed statement, but in the overall discussion, this was what came out of it.

Q. All right.

A. That if we used any illegal defensive techniques or tactics that it could cause an injury to a boy like the Holt-Granning incident with Georgia Tech. It could cause us to be seriously penalized. It could cause us to get the bad [fol. 1510] publicity from the Georgia papers which we had been receiving for almost a year and that he was greatly concerned about that.

Q. Well, then, he did say that the discussion with Butts concerned the offensive plays of any schools and defensive plays of Alabama; is that right?

A. Yes. This would have to be in regard to the change of techniques and rules interpretation.

Q. But, he did state what I just said; is that correct?

A. I don't think he came right out and said that exactly as you put it, but this was the interpretation I got out of it.

Q. What did he say?

Mr. Pritchard: I object to that as being five times that question has been asked and the witness has answered it fully and clearly and concisely and it is a pure waste of time. It is repetitious and I object to it.

Q. Would you answer the question, now, please, sir?

A. I can't tell you exactly what he said, but I can tell you the interpretation that I got from him and the discussion that we had.

Q. By interpretation, you mean what he said?

A. I can tell you what my interpretation of the conversation with him was and that was to the effect that if he used illegal offenses that it could seriously penalize the University by bad publicity and might lead to the injury of another player.

Q. But, did he say that the conversation with Butts revolved around the offensive plays of any school and the defensive plays of Alabama if they were illegal?

A. Yes, and he said that he had to know this part of it, that he considered Coach Butts the leading offensive Coach in the country and that he considered himself the best defensive Coach.

[fol. 1511] Q. Did you discuss, during your conversation with Mr. Bryant, that Mr. Burnett said he overheard specific Georgia plays being mentioned?

A. Yes, sir. I told him, and he said that was ridiculous.

Q. He denied that happened?

A. Yes, sir.

Q. Did you tell him that specific formations of the Georgia team were discussed by Mr. Butts?

A. No, sir.

Q. You did not say that?

A. No, sir.

Q. Now, if the meeting started at 7, it took about three hours, you said?

A. Yes, sir.

Q. Presumably it was over in the neighborhood of 10 o'clock?

A. Yes, sir.

Q. At the end of your conversation, did you consider your investigation complete?

A. No, sir.

Q. Was anything left for Coach Bryant to do?

A. Yes, sir. He was to go and get from his files or to get Mr. Callahan to get from his file the telephone calls that had been made from his office from a period of August 1st until October 1st.

Q. And did you plan to do anything else yourself?

A. Yes, sir.

Q. What did you plan to do?

A. I planned to discuss it with Mr. Bennett and with Mr. Coleman, former business manager of Athletics and a

member of the Athletic Committee and with Mr. Williams, a member of our Executive Committee.

Q. Now, I understand that during the week following this Sunday meeting, you had out of town commitments in Chicago, Washington, and New York?

[fol. 1512] A. I will have to consult my book. Is that all right?

Q. Certainly, sir.

This would be the week of February 24th, 1963?

A. Yes, sir. I left for Washington on February 25th, Monday, February 25th. I attended a meeting of the Commission on Accreditation in Washington on Tuesday, February 26th.

Q. Let me stop you here a moment. You left on Monday the 25th; is that correct?

A. According to my book, I did. I couldn't swear to it, but I am sure because the meeting started at 9 o'clock on Tuesday, February 26th, and there is no other way I could have gotten there that early in the morning.

Q. Do you recall what time you left Tuscaloosa that morning?

A. Usually the plane leaves at 8:40. At that time, it was leaving at 8:40 in the morning and then it left at 2:20 in the afternoon.

Q. Are these times from Tuscaloosa or Birmingham?

A. From Tuscaloosa.

Q. And do you recall whether you caught the morning or afternoon flight this Monday?

A. I think I caught the morning flight, the 8:40 flight.

Q. And where—

A. But, I am not positive about that.

Q. Where does that flight stop? Does it stop in Birmingham?

A. I believe at that time it was stopping in Birmingham and I don't know whether I took it from Tuscaloosa to Birmingham and caught another plane out of Birmingham, or whether I went to Atlanta and caught a plane out of Atlanta.

Q. Which line is it that flies the 8:40 out of Tuscaloosa?

A. Southern. That's the only line we have coming in here. Now, it could have been I could have taken the [fol. 1513] University plane or I could have used some other plane, because—but, I think that morning I took the Southern 8:40 flight out of there.

Q. And you don't recall whether you changed planes in Birmingham or not?

A. No, sir, or Atlanta.

Q. You retain your ticket itineraries?

A. No, sir. After I make out my expense account, I throw away the papers.

Q. And your recollection is that you got into Washington what time?

A. I am sorry, I can't answer that question.

Q. Did you have any business in Washington preceding the meeting of the Commission of Accreditation?

A. I could have.

Q. Do you recall?

A. No, sir.

Q. Now, you say you might not have taken the Commercial Flight you might have taken the University Flight?

A. Yes, sir.

Q. What type of plane is that?

A. That is a Cessna 310 Twin Engine.

Q. Who flies it?

A. Different people. Sometimes we use pilots out of Dixie Air, sometimes we use students, sometimes I get pilots that are friends.

Q. Now, I think you also said that there was another possibility as to how you could have traveled on the 25th?

A. Yes, sir. I used planes of friends of mine from time to time to go to different places. I used Gulf States Paper Company's plane.

Q. What type of plane is that?

A. That's an Aero Commander Twin Engine.

Q. Have a regular pilot for that plane?

A. Yes, sir.

[fol. 1514] Q. All right.

A. I used Mr. Winston Blount's.

Q. Would you spell that for the Reporter, please?

A. B-l-o-u-n-t.

He is a member of our Board of Trustees.

Q. What type of plane is that?

A. Lockheed Lodestar.

Q. Who flies that plane?

A. He has pilots, he has two or three planes.

Q. All right.

A. I used Mr. Bill Sellers.

Q. How do you spell that?

A. S-e-l-l-e-r-s.

And I used single engine plane of Mr. Harry Pritchard, Neal Morgan, anybody that is an Alumnus of the University that has a plane that I can get on.

Q. Is it your recollection that on this trip you took the commercial Line?

A. I think I took the Commercial Line that morning.

Q. You attended the meeting in Washington on Tuesday of the Accreditation Committee?

A. The title is the Commission on Accreditation of Service Experiences. It has to do with courses with the Military at colleges and universities and centers, Educational Centers around the world.

Q. Now, on that Monday which would be the 25th, did you do any further work on this Butts-Bryant matter?

A. I don't recall whether I did or not.

Q. Did you discuss it with anybody that day?

A. I don't recall. It may have been that I called Mr. Luther Callahan, our comptroller, and asked him to get me the telephone records. But, I don't believe that I discussed it or the reason why with anyone.

Q. In other words, on this Monday which would be the [fol. 1515] 25th, you may have asked Mr. Callahan to forward you some telephone records?

A. Yes, sir, and have it in my office when I return.

Q. But you are not sure you did that?

A. No, sir.

Q. But, you discussed with no one else other than the possible exception of Mr. Callahan, this matter?

A. I am pretty sure I didn't, because I didn't discuss it with you, Mr. Bennett, until Friday, did I?

Q. Now, did you discuss it with anyone either in person or by correspondence or over the telephone while you were in Washington?

A. No, sir.

Q. Were you in Washington all day Tuesday?

A. Yes, sir.

Q. Did the meeting take all day?

A. I think it took until about 4 or 5 o'clock in the afternoon.

Q. Do you remember the names of any other individuals that were at the meeting?

A. No, sir, but I can get them for you.

Q. What type of individuals?

A. I know the people that were on the committee. I don't know whether they were present there or not. They were University Presidents and Deans.

Q. Was it a large committee?

A. Yes, sir.

Q. About how many, roughly?

A. Again, I am going to have to guess. I would say about thirty and it was composed of Military Personnel, too, out of the Pentagon.

Q. From Washington where did you go?

A. To New York City.

Q. And when did you leave Washington, do you recall?
[fol. 1516] A. I think I left Tuesday, the 26th, but I am not sure. But, I think that is when I left.

Q. How did you get from Washington to New York?

A. I flew on a plane.

Q. Commercial Plane?

A. Yes, sir.

Q. And what was your business in New York?

A. I was to attend the meeting of the National Foundation which used to be the National Foundation for Infantile Paralysis. I am not sure they had a quorum and had a meeting at that time, because there had been several times that I had gone up and at the last minute people would have to cancel out and they wouldn't have a quorum and they would change the meeting. But, that meeting was set and that was the purpose of my going to New York.

Q. Now, is this a Committee or Commission or Board of Trustees, or what of his organization?

A. Board of Trustees.

Q. How many are on it?

A. I think twelve.

Q. Who are they?

A. Mr. Basil O'Connor is the Chairman, Mr. Tom Russell of Alexander City is on it now, I don't believe he was on it then. The Provost of the University of Chicago, is on it, and I don't recall his name. There are several others that I just don't specifically recall.

Q. Now, you don't recall whether they had a meeting on that Wednesday or not; is that correct?

A. No, sir, I don't recall. I just don't know, because there were, during this period—see, this would have been my first meeting. I had been up for four meetings and one or two of them were changed because they didn't have a quorum and I would get a call from down here at the office telling me that the telegram had come stating they couldn't [fol. 1517] have the meeting the next morning because they had cancellations.

Q. How long did you remain in New York?

A. According to my schedule, I remained there until Friday morning, March 1st. But, Mr. Bennett can help me refresh my memory on this, because instead of going to Chicago, we decided that we should have a meeting in Washington, and we met in Washington on March 1st; isn't that true?

Mr. Runzer: Off the record.

(Off the record discussion.)

Q. All right. You may answer.

A. I recall, to the best of my memory, that I came down to Washington on Friday, March 1st, and had a series of meetings in Washington.

Q. Now, these meetings were unconnected with the Bryant-Butts affair?

A. Yes, sir.

Q. And during the course of this week, had you done anything on the Bryant-Butts affair?

A. Nothing except just to think about it, and kind of organize what I had in my mind. I am pretty sure that during that week I tried to reach Dr. Aderhold and was unable to reach him.

Q. By telephone?

A. Yes, sir.

Q. Now, the meetings on Friday, the first was Washington?

A. Well, there weren't any meetings. These were visitations to try to get some grant contracts for the University.

Q. Perhaps I should change it. This Friday, these appointments you had in Washington—

A. I wouldn't say they were appointments. We did see [fol. 1518] people, we got appointments, but none were set.

Q. When you refer to we, you are talking about yourself and Mr. Bennett?

A. Yes, sir.

Q. During the course of that day, did you discuss the Butts-Bryant affair with Mr. Bennett?

A. Yes, sir.

Q. This was the first time you discussed it with him?

A. Yes, sir, I believe it was.

Q. What did you say to him?

A. I told him of my visit with Dr. Aderhold and Mr. Cook Barwick in the office of Commissioner Moore. I told

him of my three hour session with Coach Bryant. We discussed the whole thing. He asked questions, and we looked at questions and discussed how best to proceed and decided that we both would think about it further and decide where we were going to go from there.

Q. Did Mr. Bennett contribute any information to the investigation that you did not know up until that time?

A. No, sir.

Q. Would it be fair to say that your meeting with Mr. Bennett was more in the line of consulting with another person's opinion that you respected to decide what should be done?

A. Yes, sir.

Q. In other words, it was you that gave information to Mr. Bennett; is that correct?

A. Yes, sir.

Q. And he was giving you his advice or opinion on how it should be handled?

A. Yes, sir.

Q. Did you return to Tuscaloosa that day, Friday?

A. Again, I am not certain. I think that we returned on Friday evening or on Saturday, but I just don't know.

[fol. 1519] Mr. McCall: Mr. Runzer, it is now 11 o'clock. Could we have a five minute recess?

Mr. Runzer: Certainly.

(Short intermission.)

Mr. Runzer: Would you read the last question and answer, please?

(Question and answer read.)

Q. Regardless of whether you returned Friday night or Saturday morning, up to this point, you have discussed the matters with Mr. Bryant, Mr. Bennett and possibly with Mr. Callahan. Had you discussed this with anybody else up to the point you returned to Tuscaloosa?

A. I am not sure somewhere in this time period or some-

time between then and my time of answering Dr. Aderhold's letter, I discussed it with some members of the Athletic Committee.

Q. Was it discussed in person?

A. Yes, sir.

Q. They were not on any of these trips with you?

A. No, sir.

Q. So, then, it could not have been before you came back to Tuscaloosa?

A. I am not sure, sir. It could have been before I left Tuscaloosa or it could have been the following time that I returned to Tuscaloosa. But, sometime in there before writing Dr. Aderhold, I discussed this with members of The Athletic Committee.

Q. This trip to New York, were you alone?

A. Yes, sir.

Q. I mean, were you alone?

A. Yes, sir.

[fol. 1520] Q. I mean, other than the other people on the plane?

A. Yes, sir.

Q. You had no one to accompany you?

A. No, sir.

Q. Now, when you got back, which was either Friday evening or Saturday, which would be March 2nd—

A. Yes, sir.

Q. You stated that somewhere in here you believe you discussed it with members of your Athletic Board?

A. Yes, sir. Sometime either before leaving or before writing Dr. Aderhold, I just don't know when that was.

Q. Well, now, who did you discuss it with specifically?

A. I discussed it with Mr. Jeff Coleman who had been business manager of Athletics. I believe that was his correct title.

Q. All right.

A. Also Assistant and had been Assistant Athletic Director, I believe, who is now the—Secretary to the Ath-

letic Committee. I discussed some time in that period with Mr. Ernest Williams, a member of the Executive Committee of the Board of Trustees, I believe. I am not sure about this, that also during this time I discussed it with Dr. Sharpton, who is Chairman of the Athletic Committee, though I am not sure.

Q. Were all of these personal discussions, that is, face to face?

A. Yes, sir.

Q. Going back to Mr. Coleman for a moment—

A. Now, I am not sure that Mr. Williams—I am not sure I discussed it person to person with him, or over the telephone.

Q. You sure Dr. Sharpton and Mr. Coleman was a face to face discussion?

A. Yes, sir.

Q. You certain you talked to these people before you [fol. 1521] wrote the letter to Dr. Aderhold?

A. Yes, sir.

Q. That would pin it down to February 24th and March 6th, between that time?

A. Yes, sir.

Q. Would you give me the discussion you had with Mr. Coleman?

A. I don't recall, frankly, what I said to him. I think my discussion was along the lines of reporting to him what Dr. Aderhold reported to me, and what Coach Bryant had reported to me, and to get their thinking about it to see just what they thought and whether—from Mr. Coleman, whether Coaches talk to other Coaches about tickets.

Q. What did he say?

A. He said he had been in charge of tickets at the University and it wasn't anything unusual for coaches to talk many times previous to any game about tickets, particularly when it wasn't a sell-out. He said that he knew that Wally Butts was an authority on football rules and football interpretations and Coaches did discuss these things.

Q. Are you speaking about rule changes when you say these things?

A. Rule changes, yes, sir. And, I don't recall whether it was then or later I asked him because of his close personal relationship to Commissioner Moore to go and talk to him about it and to get his interpretation and information that he had. But, sometime during my investigation, either before writing Dr. Aderhold, or after, I asked Mr. Coleman to do this, and he did.

Q. Did he report back to you before you wrote Dr. Aderhold?

A. I don't recall.

Q. What did he report back to you in any event?

A. He reported back to me the fact that Mr. Moore had, previous to our meeting with Dr. Aderhold and Mr. Barwick [fol. 1522] in his office on Sunday, February 24th, had been in a meeting in Atlanta or somewhere in Georgia, may have been Athens, with Dr. Aderhold and Mr. Barwick, and I believe a man by the name of Hardiman, who is an Alumnus of the University, but I am not positive about that. And I am not positive about this, but that also Commissioner Moore had talked with Mr. Burnett and that Commissioner Moore was continuing his investigation and had not reached any definite conclusions at that time, but would share, from time to time, information that he might get.

Q. Now, your conversation with Dr. Sharpton, what did that consist of?

A. My conversation with Dr. Sharpton was pretty much along the lines of reporting to him what had happened.

Q. Does that also hold true for Mr. Williams?

A. Yes. Mr. Williams also, and to ask him whether he thought that I should call an executive committee meeting or meeting of the Board of Trustees to discuss it with them.

Q. Now, with the exception of Mr. Coleman—strike that.

Did Dr. Sharpton or Mr. Williams give you any information which you did not already have?

— A. Mr. Williams was Treasurer of the University for ten years, and, of course, was responsible for paying all of

the bills and the operation of the Athletic Department. He knew that coaches called one another often before ball games to discuss tickets and different arrangements, and that it wasn't anything unusual to him that Coach Bryant and Coach Butts would have talked.

Q. Would it then be fair to say that Mr. Williams and also Mr. Coleman corroborated the fact that Coaches do discuss matters like tickets before a football game?

A. Yes, sir.

[fol. 1523] Q. But, did not give you any independent information that you did not already have?

A. Not on this specific thing.

Q. Did they give you any other specific independent information?

A. Nothing that I didn't already know or had learned and that is that the coaches from schools on our schedule or outside of our schedule talk to one another often.

Q. Now, when was the next time you saw or talked or heard from Mr. Bryant after your February 24th meeting?

A. When I returned to my office, I believe that was the time. I am not sure, but sometime during the period of my meeting—sometime during the period of my talking with Coach Bryant on that Sunday evening of February 24th, and my writing Dr. Aderhold, Coach Bryant furnished me with a letter in which he listed the calls that he had made to Athens.

Q. Now, did he give you that letter on the Monday after the meeting which would be the 24th—the 25th?

A. I don't know, sir.

Q. Well, was the letter predated or postdated in any way?

A. No, sir. The letter apparently, I guess, I don't recall, was dated the day he wrote it. But whether he wrote it—had it written early that morning and sent it right on over by one of the members of his staff, I don't know.

Q. What I mean to say is, the letter, for example, was dated the 27th of February. You did not receive it then on the 25th?

A. No, sir, why would I?

Q. I am trying to find out when you did receive it, Doctor, and you say you have no independent recollection; is that correct?

A. No, sir. I don't know exactly when I received it, but [fol. 1524] I received it sometime from the time I talked to him on Sunday night and before I wrote Dr. Aderhold, because it was—it was in a letter to Dr. Aderhold that I stated to him that Coach Bryant did call Coach Butts and I shouldn't have done that, because I am not sure that he did.

Q. Well,—

A. But, the phone calls from the office showed that there was a call to Athens.

Q. You got a letter, you say, sometime in the period between February 24th and March 6th, from Mr. Bryant?

A. Before I wrote the letter to Dr. Aderhold.

Q. Sometime in that period you got a letter?

A. Yes, sir.

Q. Am I correct in my understanding your recollection was that you believe it was here when you got back from this trip; is that right?

A. Yes, sir.

Mr. Runzer: Would you mark that Defendant's Exhibit 1, please, sir.

(Whereupon, said document was received and marked "Defendant's Exhibit 1 to the Deposition of Dr. Frank A. Rose" and a photostatic copy is submitted in lieu of the original and is attached to the deposition.)

Mr. Runzer: Do you want to see it?

Mr. Pritchard: Yes, sir, if you offer it. You go right ahead.

[fol. 1525] Mr. Runzer: I would like to have the letter back.

Mr. Pritchard: Oh, I beg your pardon.

Q. Doctor, I show you a letter which is marked as Defendant's Exhibit I on stationery, I believe, of the Athletic Department of the University of Alabama under date of February 28, 1962, and ask you if that is the letter of Mr. Bryant to which you just referred? Excuse me, Doctor, but we are getting on to 1 o'clock.

Mr. Pritchard: We decided to cancel out 1 o'clock and go right on through.

Mr. Bunzer: Please don't interrupt.

Mr. Pritchard: We decided to go on.

Q. Is that correct, doctor?

A. Yes, sir.

Q. Let's get one thing at a time. We are cancelling the 1 o'clock deadline?

A. Yes, sir.

Mr. Pritchard: We want to get through right now.

The Witness: I would like to get through.

Mr. Runzer: I can't blame you, Doctor. I want to make sure.

[fol. 1526] Q. Let me ask you a different question, Doctor. Let me put the letter aside.

A. I think that's the letter I received. I don't think I received another one. However, it is a longer letter than I thought.

Q. Let's ask the question this way.

Is it your opinion that when you returned from this trip which was to New York and Washington, there was a letter from Coach Bryant?

A. Yes, sir.

Q. I assume you read that letter?

A. Yes, sir.

Q. And also during this time it is your best recollection after you discussed the matter with Mr. Coleman, Dr. Sharpton and Mr. Williams?

A. I am pretty sure. I am not certain, but I think it was during this time that I did.

Q. All right.

Now, did you have any discussion over this week-end with Mr. Bryant?

A. I am not sure.

Q. Well, now, in your previous testimony in Atlanta, you said that you talked with Mr. Bryant twice after your initial meeting. Could you tell me when those conversations took place?

A. No, sir, I don't know when it was.

Q. Do you now recall whether you talked to him twice more or not?

A. Yes, sir. I talked to Coach Bryant twice after my Sunday evening talk; but when it was, I don't know exactly.

Q. Were these face to face meetings?

A. One was face to face, and the other one, I believe, was on the telephone. Both of them may have been face to face.

[fol. 1527] Q. Now, what was the conversation in the first subsequent conversation with Mr. Bryant?

A. I don't recall exactly. I do know that I wanted to know more about the telephone calls. I wanted to know about Coach Butts' call to him, and whether he had made a call himself to Coach Butts. And I believe it was at that time, I am not certain, that he informed me that he had discovered, since our initial talk, that he couldn't have received a telephone call in which Coach Butts called him from Athletic Field, because they didn't have practice that day and that he doubted seriously that he had called Coach Butts back, though there was a telephone charge to that.

Q. Now, when is the next time you talked to him?

A. I just don't recall.

Q. What was said?

A. I am sure it had to do further with his thinking about the telephone conversation and what they discussed.

Q. Was he any more definite as to whether the calls were or were not made?

A. No, sir.

Q. Was he any more definite as to what was or was not said?

A. No, sir, but he was—he became more and more of the opinion that it had to do with the interpretation of these rule changes, because this had been one of his real great concerns, but he wasn't positive.

Q. In other words, he still wasn't sure what was discussed?

A. No, sir.

Q. But, his opinion was now that he probably talked about rules and changes in rules?

A. Yes, sir.

Q. Did he rule out the fact that he might have talked about the ticket sale?

A. No, sir.

[fol. 1528] Q. He did not rule that out?

A. No, sir.

Q. Did not rule out the possibility of talking about Continental Enterprises?

A. No, sir.

Q. These were the only three discussions you had with Mr. Bryant between 2-24-63 and the writing of the letter to Dr. Aderhold?

A. I am not sure whether those additional two came before the writing of the letter. They may have come even after that, I am just not sure because, you see, I was looking into this problem over a period of several weeks, and I just don't recall exactly, but, I—

Q. Doctor, I just wanted to try to jog your memory. I realize this happened sometime ago, and been a lot of things that have happened; but, on page 1414 of the record in the trial in Atlanta, you were asked this question. "Did you, after that particular meeting in your office on Sunday, February 24th, talk to Coach Bryant again on several occasions?" And your answer is recorded here as, "Yes, sir. I talked to him twice after that before I wrote to Dr. Aderhold." Now, I want you again to try to think. Did you talk

to Coach Bryant three times in all between the meeting of the 24th with Mr. Moore, Mr. Barwick and Dr. Aderhold and the letter that you wrote to Dr. Aderhold on March 6th?

A. Let me look at my calendar. You see, the problem that I have, sir, is we were going to—we were under a Federal Court Injunction to integrate the University of Alabama and we had applications and this is a rather serious problem too. And during this same period we had two applications for March 23rd enrollment of two Negro students in Huntsville, Alabama, and we had applications for enrollment here in the summer for the summer term on the main campus and it was during the same period [fol. 1529] that we are talking about now, about this investigation, that I was going through all the problems, meeting with the Governor, meeting with Board members, meetings with various people on the whole problem as related to the University Student Faculty, and this is why I find it difficult to pin myself down to dates, because it is just almost impossible to carry those two burdens and remember specific times and specific dates. I would say now, looking at my calendar, that I—that it was during the period of February 24th to March 6th, that I talked to Coach Bryant on those two other occasions, but I can not certain. But, I think it was, because I was away from the office an awful lot immediately following that.

Q. Now, during those subsequent conversations, did Mr. Bryant tell you that he had found there had been a call charged to him to Coach Butts in Athens?

A. I believe he said that there had been a call charged to the Department, but that he did not recall talking to him specifically himself on that particular time.

Q. Did he state to you at that time whether he knew what was discussed in that subsequent call on September 16th?

A. No, sir, except he went over what you and I have gone over that they could have talked about, these rule

interpretations, the Butt blocking and Head blocking, and so forth and so on.

Q. In other words, what he said was there is a call, I don't know whether I made it or not, I don't know what I talked about, if I did make it, but what I might have talked about was rule interpretations, ticket sales and Continental Enterprises?

A. Yes, sir. That's pretty much it.

Q. Now, did he later—strike that.

And was that the state of your information at the time you decided to write Dr. Aderhold?

[fol. 1530] A. Yes, sir.

Q. In other words, up to the time you wrote Dr. Aderhold, Coach Bryant had never informed you that he had made a call on September 16th; is that correct?

A. That's correct.

Q. And he never told you what he talked about on those dates, because he didn't remember what he talked about; is that correct?

A. That's correct.

Q. On the basis of this information, and the telephone record, you proceeded to try to write the letter to Dr. Aderhold?

A. Yes, sir.

Q. Now, you stated previously in your testimony in Atlanta that the letter was dictated in a hurry on the morning of March 6th as you had to catch an 8:40 plane to Washington; is that correct?

A. That's what I stated, but I didn't have my date book there with me previous to leaving here.

Q. Excuse me.

Will you answer the question first?

Mr. Pritchard: I suggest that he is entitled to answer the question in his own way.

A. I am going to answer the question.

Mr. Runzer: Would you read the question. I don't think you understood the question. You can make whatever explanation you want to.

Mr. Pritchard: Don't cut him off or try to.
[fol. 1531] Mr. Runzer: Just a moment. Would you read the question back, Mr. Zegarelli?

(Question read.)

A. Yes, sir, that is what I stated.

Q. Is that a correct statement?

A. Well, on checking my calendar before leaving here to go to Atlanta, I looked at March 6th and saw Washington there on my calendar, and took it that that was the destination. The plane leaves here in the morning at 8:40 to go to Washington and New York and other places. But I am not positive that this was where I went; I am not positive that I dictated the letter that morning. Now, also, in my testimony I said on Monday, Monday is the 4th. But, I didn't have my date book with me at the trial to check out the dates, and as I told you, I was going through two crises at that time so far as the University was concerned, and all I did was quickly refer to my calendar and saw that Washington was on March 6th; but, that meeting probably had been changed to our Friday meeting in Washington, which I met with Mr. Bennett, or it could have been that I went to Washington. I don't know, but during that period, during the period of January—of February, March, April, May, June, I took many trips to Washington, and over the State of which there are no records. Nothing on my calendar to designate that, because many of them were confidential trips to try to work out some of these problems that we have here at the University.

Q. Doctor, is it fair to say that you cannot state, under oath, that you went to Washington on the morning of March 6th?

A. I am saying that I am not sure.

Q. And that when you said under oath in Atlanta that you did that, that it may be incorrect?

[fol. 1532] A. It could be incorrect because I didn't have my date book. But, to me it is immaterial. I dictated the letter to my secretary hurriedly. I told her to check with Coach Bryant. I left this office to go somewhere, and during the interval, she typed the letter and tried to get in touch with Coach Bryant. He was out of town. She went ahead and mailed the letter. I didn't sign it, I didn't read it before it went out, and I left this office and I don't know exactly where I went. My calendar said March 6th I went to Washington.

Q. Let's go back for a moment.

When did you dictate the letter?

A. I am not sure when I dictated the letter.

Q. Now—

A. I thought looking on my calendar in August that I dictated the letter on Monday morning, March 6th; but, March 6th was Wednesday morning, and all I did was look at March 6th in August before I went over to Atlanta. I saw Washington there, and I thought that was the morning that I dictated the letter and went to Washington. On checking my secretary's notes, she had there that I dictated the letter on Tuesday morning. She states that she could be in error, that it could have been Monday morning. But, apparently now it looks as though I dictated the letter on Tuesday morning and left to go somewhere.

Q. And Tuesday would be March 5th?

A. Yes, sir.

Q. March 5th, 1963?

A. Yes, sir.

Q. Are you still saying it was dictated on a morning?

A. Yes, sir.

Q. You are certain of that?

A. Yes, sir, I am positive.

Q. You certain it was dictated hurriedly because you had to leave?

A. Yes, sir.

[fol. 1533] Q. Are you saying you had to leave to catch this 8:40 plane?

A. I am not sure, but that's the time that the plane leaves, if I was going to Washington. I am not sure I went to Washington.

Q. Let's go back a moment. Where did you dictate the letter?

A. Here in this office.

Q. You were in that chair? (Indicating)

A. Yes, sir.

Q. Was the secretary in here?

A. Yes, sir.

Q. That's a Mrs. Park?

A. Yes, sir.

Q. Does she take hand transcription?

A. Yes, sir.

Q. You did not dictate to a machine?

A. No, sir.

Q. Now, tell me something about the letter, Doctor? Was it a difficult letter to write?

A. Yes, sir, it was.

Q. Would I be correct then in assuming, like most of us, you just didn't sit down and dictate a difficult letter in a hurry or right off the top of your head?

A. I had one a great deal of thinking about this and tried to organize it as a layman and from the interpretation and the conversation I had with Coach Bryant, to send a letter to another layman, a University President, to try to answer some of the questions that he had raised in the meeting that I had.

Q. Well, did you dictate it all in one uninterrupted sentence?

A. Not in one uninterrupted sentence.

Q. I said uninterrupted sitting?

A. I dictated the letter uninterrupted.

[fol. 1534] Q. In other words, it wasn't a holding dictation, you didn't stop to think about it?

A. I did the best I could in writing it, yes, sir. I just didn't go right down the line on it, I did the best I could.

Q. I am trying to find out if you did your thinking before you dictated it?

A. I did some of it to try to get it into points to interpret for Dr. Aderhold some of the questions that he had raised.

Q. Did you have, when you were doing the thinking or dictating, the notes that you had taken in the meeting with Mr. Moore, or the meeting with Mr. Bryant?

A. No, sir.

Q. You had destroyed those?

A. I don't know what I did with the notes. Apparently I had placed them in my holder here, and I just don't know. I looked for them everywhere.

Q. You did not have them at the time you dictated the letter?

A. No, sir.

Q. Or at the time you were preparing to dictate the letter?

A. No, sir.

Q. Now, let me ask you again. Did you have to stop in the middle of your dictation to consider what you were going to say next?

A. I guess as you would on any letter that you are writing. You just—I am not one of these rapid fire people who dictate fast.

Q. In other words, you didn't have a prepared script with you, in effect, to read to your secretary?

A. No, sir.

Q. You were composing this as you went along?

A. Yes, sir.

Q. Although you had done some organizing before hand?
[fol. 1535] A. In my own mind; yes, sir.

Q. Any written summary or outline?

A. No, sir.

Q. How long would you say it took you to dictate the letter?

A. Oh, ten or fifteen minutes.

Q. Is that an unusually long period for one letter for you?

A. Important letters, no. It is about right. I wasn't attempting to write any legal document or any letter to be used in a court trial or anything like that.

Q. It was an important matter, an important letter, wasn't it?

A. It was an important letter to try to answer some of the questions in my layman's language of what Dr. Aderhold had raised.

Q. And the question that Dr. Aderhold raised was whether or not Mr. Bryant had received information from Mr. Butts which could affect the outcome of the Georgia-Alabama Football Game?

A. Yes, sir.

Q. That is the question you were trying to answer?

A. Yes, sir.

And I think in my letter it is quite evident, taking the letter in total, that I answered that question that at that time I was convinced that he had not received any information that affected the outcome of the game.

Q. Now, is it your testimony today that after the dictation you had to leave the office?

A. Yes, sir.

Q. How long did you remain in the office after you dictated the letter?

A. I just don't know.

Q. Was it dictated during normal business hours?

A. Early in the morning.

[fol. 1536] Q. During normal hours?

A. She usually comes, on days that I have to dictate, a few minutes early and particularly if I have got to leave. But, normally we start dictating at 8 o'clock, and this is before other people get into the office, and dictate until around 9:30 or 10 o'clock.

Q. What office hours—what are Mrs. Park's normal hours?

A. From 8 o'clock or 8:15, I forgotten exactly which, to 4:45 with an hour and a half for lunch.

Q. Did she come in early this particular day?

A. It was my recollection that she did, because of things that were piled upon the desk and other correspondence and things like that.

Q. Now, you, of course, had a chance on numerous occasions since this letter was dictated to examine the letter?

A. I don't know about numerous occasions, I think I read it four or five times.

Q. Is the letter transcribed as you dictated it regardless of whether your dictation is correct?

A. To the best of my thought, it is pretty much what I dictated to Mrs. Park.

Q. In other words, any errors in the letter were not errors of Mrs. Park?

A. Well, I haven't examined it for errors. I do think that it is unfortunate that I, as a layman, used the word plays instead of the techniques and that I didn't use more care in preparing it. But, it was, as I say, just a letter from one University President to another about a field that neither one of us are very familiar with.

Q. My question is, Doctor, if there are any errors in the letter, they are errors of the Secretary?

A. No, sir.

Q. Are there some secretarial errors?

A. I don't know.

[fol. 1537] Q. Would you examine the letter and show me any places where it was transcribed differently than you dictated?

A. I don't think I have to read it for you. I think I could say, as to the best of my memory, this is what I dictated to Mrs. Park. I can't swear that it is exactly what I dictated to her, but I think this is pretty much my dictation and at that time, my best interpretation.

Q. This refers to your letter dated March 6th, addressed to Dr. Aderhold, President of the University of Georgia?

A. That's correct.

Q. So that to the best of your recollection, any errors in the information which is recorded here were errors that

were made by you or because something that happened to you and not Mrs. Park?

A. Yes, sir.

Q. Was the letter typed while you were in the office?

A. No, sir, I don't think so, because I think I left immediately after finishing dictation.

Q. Did you—had you ever discussed, before this letter was written, this matter with Mrs. Park?

A. Sir, I didn't get your question.

Q. Had you ever discussed the Butts-Bryant matter with Mrs. Park before this letter was dictated?

A. No, sir.

Q. By discussing, I mean dictated anything to her that would let her know what this is about?

A. No, sir, not that I recall.

It may be that she—I am pretty sure that she saw Coach Bryant's letter.

Q. Now, did you tell her that this was an important letter when you dictated it?

A. No, sir, I don't believe I did.

Q. Then, as far as she was concerned—

A. But, I did tell her that I wanted her to be sure to [fol. 1538] call Coach Bryant and ask him if this was a good interpretation of our discussion in answer to the questions of Dr. Aderhold.

Q. Had you attempted to check your thinking with Mr. Bryant before you dictated the letter?

A. No, sir.

Q. Except for the three conversations you had with him, you hadn't contacted him?

A. No, sir.

Q. No, sir; I am right, is that what you are saying?

A. Yes, sir.

Q. Now, you don't recall now where you were going when you left the office the day that this was dictated?

A. I thought, sir, I was going to Washington when I testified over in Atlanta, because, as I said, I just checked my calendar early before I left. You may recall I was called back from Mexico to testify.

Q. For the record, Doctor, I was further away from Atlanta than you were at any time during the proceeding, and I know nothing except what I read in the Record.

Would you read the last question back?

(Question read.)

A. No, sir, I don't. I thought when I testified that I was going to Washington, but I am not sure.

Q. Now, we do not know now when we said it was dictated on Monday, March 6th, that was an error; is that correct?

A. Yes, sir. Now, I know it was.

Q. Because Monday was the 4th?

A. Yes, sir.

Q. Does your calendar show any engagement for the 4th of March?

A. No, sir.

Q. Show any engagement for the 5th of March?

[fol. 1539] A. Yes, sir.

Q. What engagements do you have there?

A. I can't tell whether I met them or not, because as I said, during this period I had many engagements with particular individuals that I made. I met with Dean Bidgood.

Q. Would that have taken place in his office?

A. Yes, sir.

Q. Did you have a time down for Dean Bidgood?

A. I have a time of 11 o'clock, but I don't think I met with Dean Bidgood that morning. I had a Staff Meeting at 2 o'clock and 4 o'clock, but I don't think I had those meetings that day.

Q. Am I correct that it is now your best recollection that the letter was dictated on Tuesday, March 6th?

A. I don't have any recollection about it at all. I don't know when it was dictated. Now, my secretary's notes show that it was dictated Tuesday, March 5th, in the morning. She said, and Mr. Bennett says that I left here on Tuesday morning. No one knows where I was going. I have no rec-

ord of it. This is not unusual, because during this period I made many confidential trips. Sometimes I would tell Mr. Bennett and sometimes I wouldn't tell him.

Q. Is it true your expense records show no trips for March 4, 5, and 6?

A. There is no expense record for any of these confidential trips.

Q. I understand that, but I am asking, do your records show any trips, not whether you made any trips; but do your expense records show any trips for March 4, 5, and 6?

A. I don't think so.

Q. Have you had an opportunity to review them?

A. I believe I have asked my secretary to review them.

Q. All right.

A. And I believe I asked the comptroller to.

[fol. 1540] Q. Now, you don't recall now where you were going when you left on the day you dictated this letter?

A. No, sir, but I don't think that's important. I think the important thing is, I say it over again, I dictated that letter hurriedly. I told my secretary to call Coach Bryant and check on it and get it out to Dr. Aderhold as soon as possible.

Q. But, you don't recall where you were going when you left?

A. No, sir.

Q. Now, you stated in Atlanta you were going to Washington to a meeting of the American Council on Education?

A. Yes, sir. I had just returned the night before or morning before I left here from Mexico City, and then took the University plane, I think, to Atlanta to get there to testify by 11 o'clock in the morning and I believe I was up all night trying to get back from Mexico. I am not sure, but I think it was; I got a phone call to be there at 11 o'clock, I remember that.

Q. Did you have to go to a meeting on March 6th, in Washington, for the American Council on Education?

A. I was supposed to go to Washington for a meeting

on March 6th. I don't know whether it was for this special committee on the Accreditation of Service Experiences or not.

But, at that time, that would have been pretty much the meeting; but looking back on my calendar, I find that I did go there on Tuesday, February 26th, for the meeting. So, apparently I had that meeting confused with the meeting I had in Washington the week before.

Q. Is the American Council on Education and this Accreditation thing the same thing?

A. The Commission on Accreditation for Service Experiences [fol. 1541] is a Commission of the American Council on Education.

Q. And where would the meeting take place?

A. It would be held in Washington.

Q. Where in Washington?

A. At the American Council building.

Q. Which is located where?

A. I don't know. It is on Massachusetts Avenue, I think. I can get it for you.

Q. Is it a building with a name, or do they rent offices in a large building?

A. No, sir. They have their own building.

Q. Presumably then it would be listed in the street directory in Washington?

A. Yes, sir.

Q. Now, do you know how long you were away when you left on this trip?

A. No, sir, I don't.

Q. And you don't know what you did?

A. No, sir.

Q. And do you know who you talked to?

A. No, sir.

Q. Do you know what you talked about?

A. No, sir.

Q. Has Mr. Bryant ever informed you that he called Mr. Butts on September 16th?

A. No, sir.

Q. You stated in Atlanta that this was a surmise because the record showed such a call; is that still your understanding?

A. Yes, sir, and I believe Coach Bryant. I believe that in talking with Coach Bryant, not long ago, that he told me he is till not sure he was the one that called.

Q. Now, when were you advised that the letter to Dr. [fol. 1542] Aderhold had been made public, or at least gotten available to the public?

A. I got a telephone call and I don't know when, but it was when the attorney general of Georgia was making his so-called investigation, a news analyst on one of the radio or television stations called me and told me he had seen the letter, and would I care to comment on it. I told him no, that I didn't have anything to say, that I was surprised that Dr. Aderhold would take a confidential letter from me and make it public and to try it in the public when it wasn't written as a legal record and wasn't written to be used for a legal purpose. It was my best interpretation, as a layman, of my discussion with Coach Bryant.

Q. Did you later discuss with Dr. Aderhold, that the letter had been subpoenaed from him?

A. I called him.

Q. Did he tell you that?

A. Yes, sir.

Q. Now, subsequently on March 23rd, 1963, the Birmingham Post carried a statement concerning that letter reportedly to be written by you; is that correct?

A. Is that statement about techniques?

Q. Yes, sir.

A. Yes, sir.

Q. And in all fairness to you, Dr. Rose, I think we should make sure we are talking about the same thing.

I am referring to a statement as follows: "The substance of any letter to Dr. Aderhold is accurate and correct. This letter was my personal and first response to the first conference held between President Aderhold, Commissioner Bernie Moore and me.

It was an attempt on my part to relay in laymen's language the substance of the telephone conversations between Coach Bryant and Butts after a preliminary examination of the facts by me. It was understood by all parties that I [fol. 1543] was to continue, and I have done so, a complete, thorough and exhaustive investigation of the extremely serious charges directed against Coach Bryant and Coach Butts.

Since the latter was a purely preliminary, personal communication between Dr. Aderhold and me, I did not take the time to verify in explicit detail either the exact sequence of events or the interpretation of my layman's language as it relates to the technical phrases used by coaches and athletic directors in modern day football. The substance of my letter is accurate.

Coach Butts and Coach Bryant were discussing the impact of rules changes on the defensive and offensive techniques employed in the Southeastern Conference, particularly as they relate to the Alabama Squad in its forthcoming season, including its opener with the University of Georgia.

In my letter, I say they discussed offensive and defensive plays. The appropriate phrase should have been, and still remains, techniques.

Now, there was more to the statement than that, but is that the statement?

A. Yes, sir, and I wrote it right here by longhand on this desk.

Q. Did you consult with anybody on that?

A. Mr. Jeff Bennett.

Q. Did he assist you in the drafting of that?

A. Made two or three corrections.

Q. Obviously then, you must have learned of the publication of your letter to Dr. Aderhold prior to March 23, 1963?

A. I just don't know, sir.

Q. Well, your statement appeared in the Birmingham Post on March 23rd, 1963; is that right?

A. I am not even sure about that.

Q. It did appear on March 23, 1963?

[fol. 1544] A. Then, if it did appear, then, apparently, I wrote that statement on the 22nd, I believe; I am not sure.

Q. Certainly you would have written the statement before it appeared in the Birmingham Post?

A. Yes, sir.

Q. And certainly would seem rational that you knew the Aderhold letter had been published before you wrote that statement; would that be correct?

A. I don't know whether the letter had been published, but Dr. Aderhold, I called and he informed me that afternoon that it had been.

Q. Let me rephrase it then. The statement was written after you learned that Dr. Aderhold's letter had been subpoenaed and was now apparently in the hands of the television people?

A. Yes, sir.

Q. Now, in the interval between learning this and the writing of this statement, did you consult with Coach Bryant?

Mr. McCall: We want to interpose an objection to any question about that newspaper report which occurred after the article printed in the Saturday Evening Post of March 23rd after the article had gone to Press, which under the undisputed evidence in the case, shows that it went to Press on or about March 3rd, 1963?

A. May I, off the record, ask one question?

Mr. Runzer: Off the record.

(Off the record discussion.)

Q. Mr. McCall made an objection, which I believe was on the record. I hope so, anyway.

In the interval between learning of the publishing of the [fol. 1545] Aderhold letter or being informed by the Doctor that the letter had been subpoenaed and the dating of the statement that appeared in March 23rd Birmingham Post, March 23, 1963, did you consult with Coach Bryant?

A. I am pretty sure I did. I am not certain of it. I am pretty sure sometime in here I had—yes, sir; I think I did.

Q. Did you discuss your letter with Dr. Aderhold?

A. With Coach Bryant?

Q. Your letter to Dr. Aderhold with Coach Bryant?

A. Yes, sir, but he said he hadn't seen the letter that I sent to him.

Q. Now, the statement we just read points out, as I think you said a mistake in the letter in the use of the word plays when it should have been techniques; is that correct?

A. Yes, sir.

Q. Who was the one who told you that was a mistake?

A. I believe that was at the time I called Coach Bryant and read the letter to him; I am not sure. He said that just isn't right. This isn't what I told you. He said we never talked about plays. He said we talked about techniques and we talked about things that would have been illegal in rule interpretation. I believe that that was the day that I read the letter to him.

Q. So, it was Coach Bryant that pointed out to you that there was a mistake in the letter?

A. I am not sure, but I think it was Coach Bryant.

Q. And there may be others?

A. Could have been. I just don't know. I still continue to say plays and I don't know that much difference about it.

Q. But, whether Mr. Bryant was the first or not, you did say he pointed out to you the letter was wrong?

A. Yes, sir.

Q. And was your subsequent statement which appeared in the Birmingham Post, March 23, 1963, drafted in reliance [fol. 1546] on the information that Mr. Bryant had given you in this recent conversation with him?

A. Partly.

Q. What other basis?

A. On my reading the letter and the information that I had gotten between that time of writing it and what I had and as I said, in consultation with Mr. Bennett.

Q. Now, in discussing this letter with Mr. Bryant, he pointed out to you there was an error in it. Did he still say he was not sure whether they talked about the rule changes?

A. He said to me, Dr. Rose, you really did not understand. I am a damn poor coach to not to be able to keep my President better informed on football than you are. That's a very poor interpretation of our conversation.

Q. Well, was he still saying that he did not recall what was talked about in the conversation with Mr. Butts?

A. He said that. He said to me that he didn't know what he talked to him about. This is what he told me that afternoon. He said, I told you it could have been and tried to explain, but he said I am a poor coach—

Q. In other words, he was still telling you he did not know specifically what was talked about and that rule changes was one of the things that could have been talked about?

A. Yes, sir, and about which he was really concerned, and that Coach Butts had the knowledge and explanation.

Q. And did he also again repeat he might have talked about the ticket sales and Continental Enterprises or other investments?

A. No, sir.

Q. In other words, he just said we could have talked about rules changes?

A. He didn't—we didn't even discuss that. He was so [fol. 1547] upset over the poor job I had done answering the letter, we just didn't talk about it.

Q. What exactly did he say then? Maybe I misunderstood you?

A. He said that the letter was all wrong, that I misinterpreted what he said to me, and tried to explain that he could understand how I got some of this misinformation, but it was a very poor interpretation of his conversation with me.

Q. When did you learn the date of—when did you learn that a call had been made from Tuscaloosa to Athens on the 16th, not who made it, but that a call had been made?

A. I still don't know who made, and I don't know exactly where I learned about the call.

Q. Who told you, Mr. Callahan or Mr. Bryant?

A. I am not sure. Mr. Callahan gave me some information; Coach Bryant gave me some information; I just don't know.

Q. Did Coach Bryant ever tell you which rule interpretation he was concerned about?

A. He tried his best to explain it to me, and even tried to show me. But, I mean, I just couldn't understand it all. I know what blocking is, and I know what tackling is, but I don't know what butt blocking is and I don't know what head blocking is, and I don't know what is legal and what is illegal, and all of the rules they have in scientific football today.

Q. Now, the statement says that Mr. Butts and Mr. Bryant were discussing the new type of rules of offensive and defensive rules?

A. This is my interpretation.

Q. Is that a correct statement? They were discussing the impact of rules on offensive and defensive plays?

A. I don't know. That's what Coach Bryant said they could have been talking about.

[fol. 1548] Q. This is what Coach Bryant said they could have been talking about?

A. Yes, sir.

Q. Then, it would be incorrect to say that they were talking about it?

A. Yes, sir; but you have to understand the problem that we had with the Georgia Tech incident, and with the publicity that followed the Holt-Granning incident in which the Granning boy got his jaw broken. Coach Bryant was humiliated, he was castigated, nastiest things that could possibly be written about a man were written. It was a reflection upon me and my integrity and academician as University President. There was a statement to the effect, in a sports writer's column in Atlanta, that it was nothing more than a football factory, there were nasty letters

written to me from prominent citizens in Atlanta who had just read and understood one side of it, and I had told Coach Bryant that I did not want another incident like this to happen again, and that I meant it. That this was a University, a good academic institution, and that this institution could not take that kind of publicity and maintain its academic standards.

Q. Well, in your opinion, were not the charges that were made against Mr. Bryant growing out of the Butts affair more serious than those growing out of the Holt-Granning incident?

A. Yes, sir.

Q. Far more serious?

A. Yes, sir, but I think, sir, that the charges that grew out of the conversation between Coach Bryant and Coach Butts was started and deliberately perpetrated by the same man that started the whole fuss over the Darwin Holt-Chuck Granning incident.

Q. Now, you also say in the statement that much of the Bryant-Butts conversation related to explanations of [fol. 1549] changes which Bryant proposed to introduce to his team at the suggestion of Mr. Gardner?

A. Yes, sir.

Q. Where did you get that information?

A. This was in our discussion which he explained to me that Mr. Gardner came to the University of Alabama at his request with permission of Commissioner Bernie Moore. His reason for inviting Mr. Gardner was following a conversation he had with Coach Butts in August, and I believe in Buffalo, New York, at a Coaches meeting, a Coaching Clinic, and again at a Clinic in Atlanta; and then following a meeting of football coaches of the Southeastern Conference, and his ability to understand the new interpretations. And that when he told me that this one thing was one of the things they could have been talking about, and knowing his concern about it, this was the reason I used that statement in my letter.

Q. In other words, that information came from Coach Bryant; is that correct?

A. My interpretation of what Coach Bryant had said to me.

Q. Now, when you—you remember when you gave your deposition in the Butts case on May 27, 1963?

A. Yes, sir.

Q. You were asked about that deposition in Atlanta, and you stated at that time, that is at the time you gave the deposition, you did not know for certain if Bryant had called Butts on September 16th, or what had been talked about?

A. Yes, sir.

Q. Now, is that correct, that at that time you gave your deposition you did not know for sure that Bryant had called Butts or what was talked about?

A. I wasn't certain. I thought at that time that he had called, but I wasn't certain.

[Vol. 1550] Q. Were you certain at the time you gave your testimony in Atlanta in August of this year, or of last year?

A. I thought so, and I am still not certain today.

Q. In other words, you are not certain today that Coach Bryant called Coach Butts on September 16, 1962, or what they talked about?

A. No, sir, because Coach Bryant said he is not certain.

Q. Now, prior to your deposition being taken, did you discuss the matter with anyone, that is, your deposition being taken back in May, 1963?

A. Did I discuss what, sir?

Q. The testimony or the incident with anyone in preparation for that deposition?

A. That morning we took it in your offices, didn't we?

Mr. McCall: Yes, sir.

A. And I came up to ask you—see, I never have given a deposition before and never been in court before. I wanted to know what to expect, and that's all these gentlemen told

me, to try to remember, to the best of my knowledge, and that's what I tried to do.

Q. Did you ever discuss your pending testimony with Mr. Bryant?

A. No, except he was up for—to give his deposition that day and we rode up in the car together. But, we didn't discuss any details of it.

Q. Were you in the same room at the time they were going over your testimony with you?

A. I don't believe so. Were we? I just don't know.

Mr. Runzer: Excuse me again, Dr. Rose. They can't [fol. 1551] answer. If you don't know, it is perfectly proper for you to say that.

A. I don't know.

Q. You don't recall?

A. I believe that he was asked to go outside.

Q. Did you testify before the Alabama State Legislature in this investigation?

A. Yes, sir.

Q. Do you recall when that was?

A. No, sir. I might can look it up.

Q. Would you please, sir?

A. Would you have the date when that was?

Q. If you are asking me, the answer is no, I do not.

A. No, sir, I don't have it on my book.

Q. Prior to your deposition being taken in May, 1963, did you have any conference with Mr. McCall?

A. May when?

Q. Your deposition taken May 27, 1963?

A. Yes, sir. May 16th.

Q. Where did that conference take place?

A. I am not sure. I think here, I am not sure though.

Q. Just you and Mr. McCall present?

A. No, sir. Mr. McCall and Coach Bryant.

Q. And what was discussed? Was the letter discussed at that meeting?

A. I don't know, sir.

Q. You don't have any recollection?

A. No, sir.

Q. Did you make any notes?

A. No, sir.

Q. Did you subsequently get a copy of any one else's notes?

A. No, sir.

Q. Are you certain about that?

A. Well, I am not sure.

[fol. 1552] Q. I might warn you, Doctor, don't answer so hastily, it pays you to think?

A. I just don't—

Q. I will ask you the question again.

Did you receive a copy of anyone else's notes?

A. I just don't know, I may have.

Q. Did you review—

A. I do believe on one or two times after meetings that Mr. McCall sent me copies of letters or wrote me a letter, but I am not sure about that.

Q. Did you read those letters?

A. Yes, sir.

Q. Did you read the same memos or notes that were attached to them?

A. Yes, sir.

Q. Did they accurately reflect the discussion that you had had?

A. I don't know, sir, because this was when I was really getting down to the real crisis of the integration problem.

Q. Now, getting back to the letter for a moment, the first sentence says, "I have spent a great deal of time investigating thoroughly the questions that were raised during our meeting in Birmingham and have talked with Coach Bryant at least on two occasions." Is that sentence correct?

A. I think it is.

Q. And that is your best recollection today?

A. Yes, sir.

Q. Next sentence is, "As best as I can ascertain, this is the information that I have received."

Was that sentence correct?

A. Yes, sir.

Q. New paragraph. "Coach Butts has been serving on the football rules committee and at a meeting held last summer of the rules committee the defenses used by Coach [fol. 1553] Bryant, LSU and Tennessee were discussed at length and new rules were drawn up that would severely penalize these three teams unless the defenses were changed, particularly on certain plays."

Is that correct?

A. Now, Coach Bryant informed me later that that was not what he had told me. He said that he told me that there had been changes in rule interpretation and that Commissioner Gardner, Commissioner of the Officials had told the officials to be sure and watch Alabama, Tennessee and LSU and somebody else, because they had been violating these rules.

Q. So, that second paragraph of your letter is incorrect?

A. Yes, sir.

Q. Third paragraph.

"Coach Butts had discussed this with Coach Bryant and the two were together at some meeting where Coach Butts told Coach Bryant that the University of Georgia had plays that would severely penalize the Alabama team and not only would cause Lee Roy Jordan, an Alabama player, to be expelled from the game, but could severely injure one of the offensive players on the Georgia team?"

Is that correct?

A. That is not a correct statement.

Q. In what respect is it incorrect?

A. It is incorrect there in that I was trying to reveal to Dr. Aderhold what Coach Butts was trying to explain to Coach Bryant what was wrong with his illegal defenses, were we playing any team, but I was trying to pinpoint, for Dr. Aderhold, about the University of Georgia, and he wasn't talking about the University of Georgia, he was talking about any team that Alabama would play.

Q. Let's take it apart.

[fol. 1554] Did Coach Bryant tell you that Coach Butts had discussed this, referring to rule changes, with Coach Bryant?

A. Coach Bryant said this could have been what they were talking about. They talked about it many times.

Q. One of the things they could have talked about?

A. Yes, sir.

Q. And did Coach Bryant tell you that the two were together where Coach Butts told Coach Bryant that the University of Georgia had plays that would severely penalize the Alabama team?

A. He told me they were at something which they discussed the illegal defenses that Coach Bryant was using, and then demonstrated to him plays or techniques, I keep saying plays, I mean techniques, offensive techniques that could cause the University of Alabama to be seriously penalized and probably lose the services of a player. Coach Bryant said a player like Lee Roy Jordan.

Q. Are you certain now that Coach Bryant told you that Coach Butts discussed offensive techniques which could cause Alabama to be penalized?

A. He wasn't talking about the University of Georgia's offenses. I used the term in there to relate it to Dr. Aderhold. He was talking about any offensive play in which Coach Bryant would use an illegal defensive play and Coach Bryant told me at that time over the years he and Butts had talked about these things.

Q. Did Coach Bryant say that Coach Butts said there were offensive techniques of any school that could cause Alabama to be penalized or cause a player like Lee Roy Jordan to be expelled?

A. In answer to Coach Bryant's wanting to know what the rule interpretation was.

Q. Oh, he did say that?

A. That was my interpretation, what Coach Bryant said to me.

[fol. 1555] Q. You heard what he said, you were sitting in the room?

A. Yes, sir, but I didn't understand it, I still don't.

Q. What I am trying to find out, did you understand Coach Bryant to say that Mr. Butts told him that there were offensive techniques of any types that could cause Alabama to be penalized or a player like Jordan to be expelled from the game?

A. Under the new rule interpretation.

Q. And that is what Coach Bryant told you that Coach Butts said?

A. That they could have been talking about it if they were discussing it over the telephone, but Coach Butts had said it to him at the meeting where they were talking about this thing.

Q. Fourth paragraph.

"Coach Bryant asked Coach Butts to let him know what the plays were, and on September 14th he called Coach Bryant and told him."

Is that a correct statement?

A. No.

Q. In what respect is it incorrect?

A. It is incorrect in that he wanted to know about the new rules interpretation, how it affected his defenses, some offenses in which we might be found guilty of illegal defenses, and Coach Bryant said that he knew that over the period of the summer that there were some rules changed that had to do with a defense on an end run or something, and I saw it explained on television one night, but I still don't understand it, and that—and that he had tried to get Coach Butts several times to remember exactly what the offense was that would cause the illegal defensive technique to be used.

Q. Did Coach Bryant tell you that he asked Coach Butts to let him know what the offensive techniques were?

[fol. 1556] A. Well, he said that if he did call, and if he did call him back, that this would have been one of the

things that he could have talked to him about; he didn't say specifically; no, sir.

Q. Continuing from the letter, the last portion, "And on September 14th he called Coach Bryant and told him."

Is that a correct statement?

A. Was there a call on September 14th? I have been so confused about these dates?

Q. I am asking you, sir, if it is a correct statement?

A. I am not sure, but taking that Coach Butts did call Coach Bryant on the 14th, of course, Coach Bryant said this could have been one of the things that he called him about.

Q. Where did the September 14th date come from that is in your letter?

A. Apparently in my notes.

Q. Which were taken in your meeting—

A. With Mr. Aderhold.

Q. Do you recall they used the date September 14th?

A. There was some confusion about it. I think the dates that I had when I got back here were not—not exactly the dates that corresponded with telephone conversations. I mean, with telephone records, but they were close and I didn't know exactly.

Q. Are you saying there was a confusion about the date in the meeting there at Commissioner Moore's office?

A. No, sir. I just wrote down the dates that were given.

Q. Were the dates given to you in that meeting, September 14th?

A. That's the only place I could have gotten it.

Q. Next sentence. "There was a question about another one of the offensive plays of the Georgia team that could [fol. 1557] seriously penalize the Alabama team, and bring on additional injuries to a player. Tell me, did Coach Bryant tell you that?"

A. No, sir, but this was one of the things that he tried to explain to me on that end play, and defensive techniques

where he said that Lee Roy Jordan would, instead of rushing in would pull out and run out to the end. Now, I don't know what that means, but, I did see it explained on a television program, it looked pretty good to me then; but, I still don't know anymore about it.

Q. All right.

Let's go on. "Coach Bryant asked Coach Butts to check on that play; which he did, and called back on September 16th," is that correct?

A. Coach Bryant said that could have been what the call was about, but he wasn't sure. He wasn't even sure he made the call.

Q. That is an incorrect statement, that last statement?

A. Yes, sir, but my best interpretation of what the calls were.

Q. Did Coach Bryant tell you, before this letter was written, that he did not know whether he had made the September 16th call to Coach Butts?

A. He said he didn't remember it, but he said he could have done it.

Q. Did he also say he didn't remember what was discussed?

A. Yes, sir.

Q. Am I correct in understanding that is what he has told you up to the present time?

A. That is what he told me just recently again.

Q. But, he doesn't remember the calls and he doesn't remember what was said?

A. All he remembers is that they talked many times [fol. 1558] about all of these things, but that he doesn't remember specifically.

Q. Either the call or what was talked about?

A. Yes, sir.

Q. Next sentence.

"It was then that Coach Bryant changes his defenses and invited Mr. George Gardner, head of the Officials of

the Southeastern Conference, to come to Tuscaloosa and interpret for him the legality of his defenses." Is that right?

A. That's wrong. He had Commissioner Moore bring Gardner here before.

Q. Is it correct that he changed his defenses?

A. He said that he and his coaches decided that they had better change some of their techniques.

Q. So that the word defenses should be defenses techniques?

A. Yes, sir.

Q. And also correct the date of Mr. Gardner's visit?

A. Yes, sir. I believe that was sometime in August, but I am not sure about that.

Q. That would explain then the next sentence where you say this, "This Mr. Gardner did the following week." That's also incorrect?

A. Yes, sir, but I want to say this; that Coach Bryant wasn't even clear in his own mind about that.

Q. All right.

"The defenses were changed, and Coach Bryant was grateful to Coach Butts for calling this to his attention."

Is that a correct statement?

A. I asked him, well, do you think that you got anymore information from him? He said, well, there is no doubt it has been most helpful and that anytime you do not get yourself penalized or any boy is hurt, all coaches are concerned about players, and their being hurt. And he went on to talk about how unfortunate it was that Chuck Graning [fol. 1559] had gotten hurt and his concern about it, and his concern about his own boys.

Q. Well, is the statement, the defenses were changed, and Coach Bryant was grateful to Coach Butts for calling this to his attention; is that correct?

A. The defensive technique, but the statement like it is is not exactly correct.

Q. It should be defensive techniques?

A. Yes, sir.

Q. With that addition, it would be correct?

A. My interpretation of what Coach Bryant was stating to me, yes.

Q. That would be correct as you understood Coach Bryant to tell you?

A. Yes, sir.

Q. The next sentence.

"Coach Bryant informs me that calling this to his attention may have favored the University of Alabama Football team, but that he doubts it seriously", is that correct?

A. This was after an interrogation like you are giving me that I just kept pressing him on it, but Coach Bryant had every confidence that while he was glad there wasn't any penalties or any serious penalties in the game, and no public criticism of the game in terms of what the sports-writers over there called hard-nose football and roughness, that he didn't need any information to beat the University of Georgia.

Q. Well, was it correct that Coach Bryant informed you that calling this to his attention may have favored the University of Alabama Football team, but he doubts it seriously?

A. Yes, sir; that's correct.

Q. Next sentence. "He, meaning Coach Bryant, did say that it prevented him from using illegal plays after the new change of rules." Is that correct?

[fol. 1560] A. Yes, sir.

Q. Now, skipping down, I see we are getting on to your deadline.

You say, "Dr. Aderhold, this continues to be a serious matter with me, and if you have any additional information, I would appreciate your furnishing me with it as I am not only anxious to work with you, but to satisfy my own mind."

Is that correct?

A. Yes, sir.

Q. Now, Doctor, several times during the course of your previous testimony you indicated that you feel you could write a better letter or clearer letter after having the benefit of talking to people and understanding the matter better?

A. Yes, sir, but I still don't think, sir, that I could write a legal document on it, or anything that would prove any points in court or have any substantial changes. I think in that letter I have conveyed to Dr. Aderhold that I have looked into the accusations that he has made, and that I cannot find the evidence that he was looking for and that there was no rigging or fixing that football game.

Q. Are you saying that you couldn't write a clearer letter of March 6th?

A. I think I could write a more correct letter and use better terminology, but I still don't think that I could write a letter that you couldn't sit there, as a legal mind, and pick to pieces, because I haven't had any legal training. I am not a scientific football coach. My field is philosophy and theology. That's the reason I have members of the staff to take care of these departments.

Q. Coach Bryant ever admitted to you that he did call Coach Butts on September 16, 1962?

A. No, sir.

[fol. 1561] Q. Did he ever admit to you what he talked about on that date, September 16, 1962?

A. No, sir, but he did tell me that he could have called him and this could have been what they talked about; but, he didn't know for sure.

Mr. Runzer: Excuse me. Off the record.

(Off the record discussion.)

Q. Doctor, before we stop, you are aware that we asked for your calendar book and some of your checks?

A. Yes, sir. Here it is, and here are my checks. I will need those checks for income tax purposes.

Q. I was going to suggest, and in view of your time deadline, if the Court Reporter photostats that material, we won't have to have those and could return those to you.

Mr. Pritchard: Perfectly willing to do so.

A. How do we handle it?

Mr. Pritchard: Give it to him right now.

A. This is all I have got.

Q. Doctor, just a few more infamous questions. This trip that commenced on the morning of March 5th, do you have any idea how long it took?

A. No, sir, I don't. I can't tell you exactly.

Q. Do you know how you travelled?

A. No, sir.

Q. You do not know where you went?

A. I am not sure where I went.

Q. Where do you think you went? What is your best recollection?

A. That has to be confidential.

[fol. 1562] Mr. Bennett: Could we go off the record?

Mr. Runzer: Off the record.

(Off the record discussion.)

Q. Doctor, is it my understanding, from your off the record statement, that these—this trip had nothing to do with the Butts-Bryant incident?

A. Yes, sir.

Q. And that you consider the matters that you discussed and the people you discussed them with confidential?

A. Yes, sir.

Mr. Runzer: Off the record.

(Off the record discussion.)

Q. Dr. Rose, where did you go when you left the University on the morning of March 5th?

Mr. Bennett: Now, at that point, you have been advised by me that you are free to refuse to answer on the grounds that your trip had nothing at all to do with the matter at issue and involves your confidential relationship as President of the University of Alabama.

Q. You do so refuse to answer on that basis?

A. Yes, sir.

Q. Who did you see on that trip?

Mr. Bennett: Same advice.

A. I refuse to answer that,

[fol. 1563] Mr. Runzer: Off the record.

(Off the record discussion.)

Q. How long did the trip take?

Mr. Bennett: Same objection, and can you just repeat the same grounds for refusal each time?

Mr. Runzer: And you do refuse to answer on advice of counsel?

A. Yes, sir.

Q. Were your expenses reimbursed to you through the University for these trips?

A. No, sir.

Q. You absorb them yourself?

A. Yes, sir.

Q. Do you remember the means of transportation you used?

Mr. Bennett: Same objection.

A. I don't believe I will answer that.

Mr. Bennett: Same grounds.

Q. You refuse to answer?

A. Yes, sir.

Q. Do you recall the name of the places that you went to?

Mr. Bennett: Same advice and same grounds.

A. I refuse to answer.

[fol. 1564] Q. Will you tell us the name of the Hotel or Motel where you stayed—

Mr. Pritchard: Same objection.

Mr. Runzer: I would appreciate it—

Mr. Pritchard: We object to it.

Mr. Runzer: I would appreciate it—

Mr. Pritchard: You have got enough to test your question, go ahead.

Mr. Runzer: I—

Mr. Bennett: Let the record show he refuses to answer on the same grounds.

Mr. MacLeod: Let him finish.

Mr. Pritchard: I object to it.

Mr. Runzer: Not in the middle of my question.

[fol. 1565] The Witness: When you present this to the judge, will we have an opportunity to present—

Mr. Pritchard: We will be right there, don't worry.

The Witness: Will this be a public hearing or can you get—

Mr. Runzer: Off the record.

(Off the record discussion.)

Mr. Bennett: If we can make certain, back on the record, that he refused to answer the last question on the same grounds that we resaid it before.

Q. Doctor, I would just like to go briefly into the background of your relationship with Mr. Bryant prior to his coming to the University, that is, the University of Alabama. When did you first meet him?

A. The first year that he became President of the University of Kentucky.

Q. The first year he became President?

A. I mean, Coach at the University of Kentucky and I believe that was 1946 or '47.

Q. Did you meet him in a business way?

A. No, sir, at a social gathering at a country club.

Q. Did a personal relationship develop out of this meeting?

A. No close personal relationship. I knew him and went to his ballgames and would see him from time to time and we had mutual friends.

[fol. 1566] Q. Did you ever entertain he and his wife in your home?

A. No, sir.

Q. He and his wife ever entertain you in their home?

A. No, sir.

Q. Did you continue to have a relationship with him when he went to Texas A & M?

A. No, sir.

Q. Ever correspond with him?

A. No, sir.

Q. Did you meet him during that period?

A. No, sir.

Q. Now, am I correct that you are responsible for bringing him to the University as football coach?

A. Yes, sir.

Q. How long had you been President when he arrived?

A. I was elected President on September 5th, 1957, and I made trips down every week to the University, but I remained on as President of Transylvania until December 10th, I believe it was, of 1957, as President of Transylvania. Then, I made trips back and forth from here and made administrative decisions, and during this period I obtained the resignation of the coaching staff and assumed the responsibility of employing a new coach and Athletic Director and coaching staff. I employed him on December 1st, 1957, effective January 1, 1958.

Q. And where was he employed at the time you secured him, do you know?

A. Texas A & M at College Station, Texas.

Mr. Runzer: Doctor, you can make your plane.

A. Bless your heart.

[fol. 1567] Mr. Pritchard: Thank you all.

Further Deponent Saith Not.

Certificate

State of Alabama,
Jefferson County.

I hereby certify that the above and foregoing deposition was taken down by me in shorthand, and the questions and answers thereto were reduced to writing under my supervision, and that the foregoing represents a true and correct transcript of the deposition given by said witness upon said hearing.

I further certify that I am neither of counsel nor of kin to the parties to the cause, nor am I in anywise interested in the results of said cause.

Commissioner-Notary Public

[fol. 1568]

IN THE UNITED STATES DISTRICT COURT OF THE
NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

Civil Action No. 63-166

PAUL BRYANT, Plaintiff,

versus

CURTIS PUBLISHING COMPANY, a Corporation, Defendant.

CONTINUED DEPOSITION OF DR. FRANK ANTHONY ROSE—
Filed February 28, 1964

Continued Deposition of Dr. Frank Anthony Rose, resumed in the above-styled cause on the 17th day of January, 1964, commencing at 3:45 p.m. at Tuscaloosa, Alabama, pursuant to recess of said deposition on the 8th day of January, 1964, and following the order of the Honorable H. H. Grooms, District Judge, pertaining to the examination of said witness.

APPEARANCES

Mr. Winston McCall, of the firm Pritchard, McCall & Jones, Frank Nelson Building, and Mr. Francis Hare, Sr., of the firm Hare, Wynn, Newell & Newton, City Federal Building, Birmingham, Alabama, for the Plaintiff.

[fol. 1569] Mr. Eric Embry, of the firm Beddow, Embry & Beddow, 2121 Building, Birmingham, Alabama, for the Defendant.

Mr. James Bennett, Attorney at Law, Tuscaloosa, Alabama, appearing for the witness.

Reported by
Jerry L. Rotruck

Deposition

FRANK ANTHONY ROSE, recalled as a witness, being by me duly sworn to speak the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Examination by Mr. Eric Embry:

Q. To refresh your recollection, Doctor, going back to the occasion of the prior questioning—you have a copy of that I see that Mr. McCall is giving to you—at page 138 of the deposition which was on the 8th day of January of this year—

A. Yes, sir.

Q. —you were asked this question: “This trip that commenced on the morning of March 5, do you have any idea how long it took”, and I believe you answered, “No, sir, I don’t. I cannot tell you exactly.”

“Q. Do you know how you traveled”, and you answered, “No, sir.”

Now, you previously answered you did not know where you went on this occasion, is that correct, sir?

A. Now, where are you on here, what page?

Q. 138.

A. 138.

[fol. 1570] Q. The last—

A. Yes.

Q. —complete answer on that page.

A. I am not sure where I went.

Q. I want to pick up there, if I may.

A. All right.

Q. Do you have any recollection, Dr. Rose, of where you went on that date on March 5th?

A. Mr. Embry, I don’t know what legal term or what a lawyer means by “recollection.” If you are talking about a guess, I can make a guess. I have done everything I can from checking my notes, notebook, my wife’s notebook and talking with members of my staff trying to ascertain exactly where I went that day.

Q. Have you been able to determine in order to form any recollection of your own as to where you did go on that date?

A. I wouldn't say recollection, but if you want me to guess, I can guess where I went.

Q: Well, if you define your best recollection as a guess it is all right with me, just whatever any of us can draw upon in our minds or intellects as we best recall what we did and when we did it. That is the context I am asking you this in.

A. Yes, sir. I would guess that I went to Montgomery.

Q. Montgomery, Alabama?

A. Yes, sir.

Q. Now, on that occasion do you know how you traveled? Do you have any recollection as to how you traveled?

Mr. McCall: We object.

[fol. 1571] Mr. Bennett: At this time, Dr. Rose, I would advise you that as I remember the order of the court at the hearing of this week on this matter it extended only to the question of your recollection as to where you went, not as to mode of transportation or who you saw or where you stayed, but to what city did you go?

By Mr. Embry:

Q. I don't interpret it that way. Of course, this is a matter that would probably be some point of contention between the attorneys in the case, but my understanding of the intent of the judge's order is that if you do have any recollection of where you went that I am permitted reasonable bounds of inquiry as to place, time and situation in order to identify the places you may have been.

A. I have not found out any information that would tell me definitely where I was that day, but I am having to guess at it, and I would guess that it was Montgomery.

Q. Do you have anything to which you can make reference to refresh your recollection, an appointment calendar?

A. I had an appointment calendar. You have it now.

Q. Yes, sir.

A. There was not anything there.

Q. Do you have any other thing of that nature that would serve to refresh your recollection?

A. No, sir. I have tried to find everything that I possibly could.

Q. Do you have any recollection as to who accompanied you?

A. No, sir.

Mr. McCall: Objection.

[fol. 1572] The Witness: I would have to guess at that. I just don't know.

By Mr. Embry:

Q. Do you have a recollection whether or not you, on advice of counsel, are willing to disclose? Do you have any recollection as to what mode of transportation you used?

Mr. McCall: I object on the ground it is repetitious.

Mr. Embry: I am asking if he has a recollection. I am not asking what it is.

Mr. McCall: I object on the grounds it is repetitious. You asked do you know how you traveled and he answered no, sir, on page 138, and I object on the grounds it is a repetitious question and it has already been answered in the record.

By Mr. Embry:

Q. You have had an opportunity, I assume, between the 8th and today, as you have stated, to check references in order to refresh your recollection.

A. Yes, sir.

Q. And in light of that I am asking you whether you do have any recollection, not what your recollection is, but whether you have a recollection as to what mode of transportation you used.

A. No, sir, I don't.

Q. You do not?

A. No, sir.

Q. Do you have any recollection as to whom you saw on the occasion of the visit?

Mr. Bennett: At this point I would advise you that as [fol. 1573] I understand the direction of the court on this particular part of the motion being heard filed by counsel for the plaintiff that you are not required to answer that question.

Mr. Embry: Do you decline on the advice of your attorney to answer.

Mr. McCall: We further object on behalf of the plaintiff on the grounds it goes beyond the scope of the examination and is contrary to the specific instructions of Judge Grooms.

By Mr. Embry:

Q. I just want to know if the Doctor declines to answer on the advice of this attorney, Mr. Bennett?

A. Yes, sir.

Q. Do you have any recollection as to the places, physical places—

Mr. Bennett: As to this point again—

By Mr. Embry:

Q. —at which you visited.

Mr. Bennett: At this point again I would advise that you have the right to decline to answer under the ruling of Judge Grooms for the same reasons outlined in the earlier advice to you.

By Mr. Embry:

Q. Do I take it that upon such advice to you that will be your answer and that you will decline?

A. Yes, sir.

Q. Do you have any recollection whether you stopped at a hotel or motel or a place of lodging on that occasion?

Mr. Bennett: If I might make a short rendition, you are advised as to the same question for the same reasons.

[fol. 1574] By Mr. Embry:

Q. Do I take it that upon such advice you should not answer say it and I will take that is your answer to decline to answer us.

A. All right.

Q. Do you have any recollection as to whether you visited any dining establishments or a restaurant on that occasion?

Mr. Bennett: Your advice is the same for the same reason.

By Mr. Embry:

Q. Do you have any recollection whether you had occasion to stop at a filling station or such a place as a filling station?

Mr. Bennett: Your advice is the same for the same reason.

By Mr. Embry:

Q. Or any other place of public service?

Mr. Bennett: Same advice.

By Mr. Embry:

Q. Do you have any recollection as to whether you visited any state offices of the State of Alabama on that occasion, and, if so, do you have a recollection of what offices you visited?

Mr. Bennett: Your advice is the same for the same reasons, Dr. Rose.

By Mr. Embry:

Q. Do you have any recollection of the names and identities of any persons you saw on that occasion?

Mr. Bennett: Your advice is the same for the same reason, Dr. Rose, that this was a content of a hearing of earlier this week.

[fol. 1575] Mr. Embry: We will conclude on that.

Further deponent saith not.

Certificate

State of Alabama,
Jefferson County:

I, Jerry L. Rotruck, a Court Reporter at Birmingham, Alabama, do hereby certify as follows:

That I correctly reported in shorthand the foregoing deposition of Dr. Frank Rose at the time and place stated in the caption hereof;

That the witness was by me duly sworn and was examined by counsel;

That I later reduced my shorthand notes to typewriting, or under my supervision, and that the foregoing pages 2 to 8, both inclusive, contain a full, true and correct transcript of the testimony of said witness on said occasion;

That I am neither of counsel nor of kin to any parties involved in this matter, nor in any manner interested in the result thereof;

That the reading and signing of the deposition by the witness was waived by counsel and the witness.

This 23rd day of January, 1964.

Jerry L. Rotruck, Court Reporter.

[fol. 1576]

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

Case No. 63-166

PAUL BRYANT, Plaintiff,

versus

CURTIS PUBLISHING COMPANY, a Corporation, Defendant.

STIPULATION—Filed February 28, 1964

It Is Stipulated and Agreed by and between the parties through their respective counsel that the deposition of Mrs. Marian H. Parks may be taken before Carmen Zegarelli, Commissioner, at the University of Alabama, Tuscaloosa, Alabama, on the 5th day of January, 1964.

It is further stipulated and agreed that the signature to the deposition by the witness is waived, the deposition to have the same force and effect as if full compliance had been had with all laws and rules of court relating to the taking of depositions.

It is further stipulated and agreed that it shall not be necessary for any objections to be made by counsel to any question except as to form or leading questions, and that counsel for the parties may make objections and assign [fol. 1577] grounds at the time of trial or at the time said deposition is offered in evidence, or prior thereto.

It is further stipulated and agreed that notice of filing of the testimony by the commissioner is waived.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

Case No. 63-166

PAUL BRYANT, Plaintiff,

versus

CURTIS PUBLISHING COMPANY, a Corporation, Defendant.

Tuscaloosa, Alabama

DEPOSITION OF MRS. MARIAN H. PARK
TUSCALOOSA, ALABAMA, January 8, 1964

Before: Carmen Zegarelli, Commissioner.

APPEARANCES:

Mr. William S. Pritchard and Mr. Winston B. McCall, of the firm Pritchard, McCall & Jones, Frank Nelson Building, Birmingham, Alabama, appearing for the plaintiff.

[fol. 1578] Mr. James Runzer, of the firm Pepper, Hamilton & Scheetz, 123 South Broad Street, Philadelphia, Pennsylvania, and Mr. Roderick MacLeod, Jr., of the firm Beddow, Embry & Beddow, 2121 Building, Birmingham, Alabama, appearing for the defendant.

Mr. James J. Bennett, University of Alabama, Tuscaloosa, Alabama, appearing for Mrs. Park.

I, Carmen Zegarelli, Court Reporter and Notary Public, State of Alabama-at-Large, Acting as Commissioner, certify that on this date as provided by the Federal Rules of Civil Procedure of the United States District Court and the foregoing stipulation of counsel, there came before me

at the University of Alabama, Tuscaloosa, Alabama, beginning at 2:00 p.m., Mrs. Marian H. Park, witness in the above cause, for oral examination, whereupon, the following proceedings were had and done:

MARIAN H. PARK, being first duly sworn, testified as follows:

Examination by Mr. Runzer:

Q. Mrs. Park, I am going to ask you questions, if you don't understand me, because my voice is starting to fail, if you don't hear me, stop me and make me ask it again. I want you to understand my questions before you begin to answer it.

A. Yes, sir.

Q. Now, Mr. Bennett, who represents you, has said that you will waive the signing of this deposition; is that correct?

A. What does that mean, Mr. Bennett?

[fol. 1579] Mr. Bennett: That means that you not require the deposition to be sent back to you for you to read and does not require your signature.

The Witness: Well, the last deposition was sent back to me.

Mr. Bennett: The other deposition that was taken today the same stipulation has been entered into and I just advise you to accept it.

The Witness: All right, I do.

Mr. MacLeod: We have the same stipulation and agreement as to objections that we had with Dr. Rose's deposition; that is, that it is not necessary at this time to state objections to questions except as to form of the questions.

Mr. Pritchard: Yes.

Mr. Runzer: And any objections can be made as appropriate at the time of the deposition is used.

Mr. Pritchard: That's agreeable.

Q. Would you give us your full name, please, ma'am.

A. Marian H. Park.

Q. Are you Dr. Rose's personal secretary?

A. Yes, sir.

[fol. 1580] Q. Now, I understand you have brought with you today your notebook containing the letters that were dictated to you somewhere in the vicinity of March 4, 5 and 6 of 1963; is that correct?

A. Yes, I have.

Q. Have you located in that book the notes of a letter dated March 6, 1963, addressed to Dr. Aderhold, President of the University of Georgia?

A. Yes.

Q. Would you open to those notes, please. Now, does your notebook indicate the day on which it was dictated?

A. Yes, it does. That is about the fifth letter on March 5th.

Q. Does your notebook indicate the time of the day it was dictated?

A. No, sir, it does not.

Q. Are you able to figure, from going back through your notebook, the time that it was dictated?

A. No, sir, I cannot.

Q. Do you have any independent recollection of the time of day it was dictated?

A. No, sir, I just can't recollect.

Q. Do you recall the letter being dictated?

A. Yes, sir, I do.

Q. Did it strike you as an unusual letter when you took it?

A. Well, the only thing unusual about it was that Dr. Rose asked that it be confidential, which I have in my notes here, and that it be mailed as soon as possible.

Q. Do you recall whether Dr. Rose and you had any conversation about the letter either before, during or after the dictation?

A. No, sir.

Q. You do not recall?

A. We did not have any.

[fol. 1581] Q. Would you read the stenographer the notes as you have them there?

A. Yes, I will.

Dr. O. C. Aderhold, President.
University of Georgia.
Athens, Georgia.

Dear Dr. Aderhold:

I have spent a great deal of time investigating thoroughly the questions that were raised at our meeting in Birmingham and have talked with Coach Bryant at length on two occasions and as best I can ascertain this is the information that I have received.

Coach Butts has been serving on the Football Rules Committee and at a meeting held last summer of the Rules Committee the defenses used by Coach Bryant, Louisiana State University, and Tennessee, were discussed at length and new rules were drawn up that would severely penalize these three teams unless the defenses were changed, particularly on certain plays.

Coach Butts had discussed this with Coach Bryant and the two were together at some meeting and Coach Butts had told Mr. Bryant that the University of Georgia had several plays that would severely penalize the Alabama team and not only would cause Leroy Jordan, an Alabama player, to be expelled from the game, but it could severely injure one of the offensive players of the Georgia team.

Coach Bryant asked Coach Butts to let him know what the plays were and on September 14th he called Coach Bryant and told him. There was a question about another [fol. 1582] one of the offensive plays of the Georgia team that could seriously penalize the Alabama team and bring on additional injury to a player and Coach Bryant asked Mr. Butts to check on that one and he did. Just a moment. Check on that one and he did call back on September—

wait just a minute. To check on that one and he did and called back on September 16th. It was then that Coach Bryant—this is a new paragraph.

It was then that Coach Bryant changed his defenses and invited Mr. George Gardner, head of the officials of the Southeastern Conference, to come to Tuscaloosa and interpret for him the legality of his defenses which Mr. Gardner did the following week. The defenses were changed and Coach Bryant was grateful to Coach Butts for calling this to his attention.

Coach Bryant informs me that calling this to his attention may have favored the University of Alabama football team but that he doubts it seriously. He did say that it prevented him from using illegal plays after the new changes of rules.

I have checked into other matters that were discussed and can find no grounds for Mr. Bisher's accusation and as I understand it he too has decided for lack of information to drop the matter.

Dr. Aderhold, this continues to be a serious matter with me and if you have any additional information I would appreciate your furnishing me with it as I am not only anxious to work with you but to satisfy my own mind.

Thanking you for coming to Birmingham to meet with me and for sharing this information I am

[fol. 1583] Most cordially yours

Frank A. Rose.

Mr. Runzer: Now, Mr. Reporter, would you read that back to Mrs. Park so she will be certain of her transcription, and will you follow his reading against your notes so there is no mistake talking about the same letter.

(Whereupon, said letter was re-read by the reporter to the witness.)

Q. Did Mr. Zegarelli read back the letter the way it is contained?

A. Yes, he did.

Q. At several points punctuation is indicated in your notes?

A. Yes, sir.

Q. That was dictated?

A. No, sir.

Q. Those were your additions?

A. Yes, sir.

Q. And the paragraphing also your addition?

A. I don't recall, sir. Sometimes he dictates paragraphs and sometimes I use my own judgment in making the paragraphs.

Q. You recall this letter being dictated?

A. Yes, sir.

Q. Was it a—did it strike you he was dictating easily or was it a letter he was struggling with?

A. Well, Dr. Rose always dictates very slowly and thoughtfully and I don't recall having the feeling that he was struggling with it.

Q. Would you say there was anything different about [fol. 1584] his manner of dictation with this letter than any other letter that he writes?

A. No, sir, I don't think so.

Q. Now, did I understand you to say that he told you he wanted this letter to go out as soon as possible?

A. Yes, sir.

Q. Did he also tell you to check with Mr. Bryant before the letter went out?

A. Yes, sir, he did.

Q. Do you recall that you started transcribing it right away or did something else transpire?

A. No. I apparently did not, because the letter was dated March 6th.

Q. Now, does your book indicate that other letters were dictated to you on the 5th?

A. Yes, sir.

Q. How many more letters after this one?

A. May I count them?

Mr. Runzer: Off the record.

(Off the record discussion.)

A. Twenty-seven.

Q. Twenty-seven after this letter?

A. Yes, sir.

Q. And this was the fifth letter he dictated that day?

A. Yes, sir.

Q. That would be 32 letters that were dictated?

A. Yes, sir.

Q. Do you recall how long it took to dictate those letters?

A. No, sir, I don't.

Q. Can you give me any estimation from your notes how long it would take, in your best estimate, a matter of hours? [fol. 1585] A. Well, I would say between maybe an hour and an hour and a half.

Q. Were they dictated in one long session or was he interrupted?

A. I don't recall.

Q. Do you recall how long he stayed in the office after the letters were dictated?

A. No, sir, I don't. I just don't recall.

Q. Did he tell you any of these other letters had to be gotten out right away?

A. I don't have any indication on my notes and don't recall.

Q. Would you ordinarily write on your notes if he told you that?

A. Yes, sir.

Q. This is the only letter that was dictated to go out in a hurry; is that correct?

A. Yes, sir.

Q. And do you remember the time of day on March 5th it was dictated?

A. I assume that it was in the morning.

Q. Well, now, ma'am, when you say assume, do you recall?

A. No, I do not recall, except that Dr. Rose usually dictates first thing in the morning.

Q. In other words, it is his usual custom to dictate then?

A. Yes, sir.

Q. Did he plan to be out of the office that day?

A. The best of my knowledge, he left the office.

Q. When did he return?

A. Now, I did not see him on the 6th. He could have possibly have been in the 7th; I just don't recall.

Q. Any letters in your book indicating letters on March 4th?

[fol. 1586] A. Yes, sir.

Q. How many letters did he dictate on March 4th?

Mr. Runzer: Let the record show that the witness is referring to her stenographic notebook.

A. Twenty-six.

Q. Now, when is the next dictation after March 5th?

A. March 14th.

Q. Could you show me where you indicate the date on your book?

A. Yes, sir.

Q. 3/5/63?

A. It will either be right here or here (indicating).

Q. And you put that on each page?

A. No, I do not, just when I start the dictation.

Q. And you do not make other entries of the date until the date changes?

A. That's correct.

Q. Do you recall where the doctor went on March 5th?

A. I do not.

Q. Did he not tell you?

A. No, sir.

Q. Now, was the letter dictated in this office?

A. Yes, sir.

Q. Dr. Rose was seated in the chair where you now are?

A. That's correct.

Q. And you don't recall how long it took you to get to the transcription?

A. No, sir, I don't.

Q. Did you start on the letter to Dr. Aderhold first?

A. I don't recall.

Q. In any event, you did ultimately begin to transcribe it?

[fol. 1587] A. Yes, sir.

Q. Did you read the letter back to Dr. Rose after it was dictated?

A. No, I did not.

Q. Does he ever ask you to read letters back to him?

A. Very seldom.

Q. Now, where did you transcribe the letter?

A. At my desk.

Q. Which is in the next room here?

A. Uh-huh.

Q. Is it still the same desk now?

A. Yes, sir.

Q. Same typewriter?

A. Yes, sir.

Q. With the exception of whatever age was done in the last six months it is exactly as it was at that time?

A. Yes, sir.

Q. You typed it from the notes you just read?

A. Yes, sir.

Q. Do you remember the day you transcribed it?

A. Well, the letter is dated the 6th. Our mail is picked up here in this office around four o'clock in the afternoon. Occasionally I will transcribe letters after the mail is picked up and date them for the next day because they won't go out until then; I can't remember.

Q. So, based on your custom it would have either been transcribed after four o'clock on the afternoon of the 5th or sometime during the day of the 6th?

A. That's correct.

Q. Can you explain if it was dictated to you in the morning why it took so long?

A. I can't, unless I had something to do in here in the office.

Q. You can't recall why it took you so long?

A. No, sir.

[fol. 1588] Q. When the letter was transcribed, I assume you proofread it for typographical errors?

A. Yes, sir.

Q. Do you recall that?

A. No, it's just habit.

Q. Did the letter have to be retyped?

A. I don't recall that.

Q. Do you think you could recall it if you had to?

A. I doubt it.

Q. When you proofread, do you proofread for grammar, punctuation or spelling, or do you try to improve Dr. Rose's syntax?

A. As far as I am capable, I try to send out a letter that is grammatically correct and correct in context.

Q. Did you make any changes in this letter?

A. Not that I remember, no.

Q. Now, did you show the transcribed letter to anyone?

A. I may have shown it to Mr. Bennett, but I can't say that I actually did. Occasionally if there is a letter—for instance, I couldn't get in touch with Coach Bryant, I knew a letter had to go out, I might have shown it to Mr. Bennett; I don't recall.

Q. You do not recall whether you did that or not?

A. No, sir.

Q. Do you recall whether Mr. Bennett made any changes in the letter?

A. I know of no changes that were made in the letter.

Q. Anyone make any changes in the letter?

A. No, sir.

Q. When you transcribed this from your notes, you attempted to get in touch with Coach Bryant?

A. Yes, sir.

Q. By telephone?

A. Yes, sir.

Q. And you were not able to do so?

[fol. 1589] A. No, sir.

Q. Who did you talk to, do you know?

A. No, sir, just the girl who answers the phone in the Athletic Department.

Q. Were you informed where he was?

A. No, sir.

Q. Were you informed how long he would be away?

A. I probably did inquire.

Q. So, then, after you were informed you couldn't get in touch with Coach Bryant, you may have shown it to Mr. Bennett?

A. Yes, sir.

Q. You showed no one else?

A. No, sir.

Q. No one including yourself made any changes in the letter?

A. No, sir.

Q. Was the letter that went out dated March 6th that I show you which was attached as Defendant's Exhibit 8 to your previous deposition, look that over, is that a copy of a letter that you typed up and sent out?

A. Yes, sir, it is.

Q. Now, Dr. Rose has told us that he had to leave in a hurry. So, I assume he didn't dictate any first draft or anything of that nature?

A. No, sir.

Q. The letter was typed up in final form?

A. Yes, sir. Now, right here I notice I made two sentences here. Occasionally he will dictate long involved sen-

tences and I will cut it down into two shorter sentences and I may have done that in this first paragraph.

Q. You would do that when you transcribe the letter?

A. Yes, sir.

Q. As you read from your notes, part of your secretarial job is to make slight changes necessary in grammar?

[fol. 1590] A. Yes, sir.

Q. No first draft or anything shown to anyone on this letter?

A. No, sir.

Q. You are absolutely certain?

A. Yes, sir.

Q. The letter was sent out presumably the 6th, that's the date?

A. Yes, sir.

Q. I presuppose no copy was made of this letter?

A. No, sir.

Q. It is usual procedure here to make copies of letters, isn't it?

A. Usually.

Q. Any specific reason why no copy was made in this case?

A. None, except Dr. Rose told me not to make a copy.

Q. In other words, the reason you did not make a copy was because Dr. Rose told you not to?

A. Yes, sir.

Q. If it had been left to you, you would have made a copy?

A. Yes, sir.

Q. Did you retain any copy of this letter in your file?

A. No, sir.

Q. And so I am perfectly clear, this represents what you typed up from your notes?

A. It does.

Q. No one made any changes?

A. No, sir.

Q. No one read over any draft and dictated a new version?

A. No, sir.

Q. Did you read any over, any draft, and retype it?
[fol. 1591] A. No, sir. I say that, I don't recall, but I just never do that.

Mr. Runzer: Off the record.

(Off the record discussion.)

Mr. Pritchard: We are going to object to encumbering this record with any letters in that notebook saving except they be letters that shed some light on the controversy here or that would be material evidence in the trial of this cause.

Mr. Bennett: Off the record.

(Off the record discussion.)

Q. In the course of those other 31 letters that were dictated on March 5th, is there any other letters to an individual which would relate to the so-called Butts-Bryant affair?

A. I see none other except one addressed to Bernie Moore, Commissioner Moore of the Southeastern Conference in which Dr. Rose informs him that: I got in touch with Coach Bryant in Washington and he informs me that he can meet with us on Tuesday, March 12, at 10:00 a.m. in my office. I sincerely hope that this meets with your schedule.

Q. Excuse me. Did you just recite the actual wording from your notes?

A. Yes.

Q. Would you repeat it, I missed it.

Mr. Bernie Moore

Commissioner

Southeastern Conference

[fol. 1592] Redmont Hotel

Birmingham, Alabama

My dear Bernie:

I got in touch with Coach Bryant in Washington and he informs me that he can meet with us on Tuesday, March 12,

at 10:00 in my office. I sincerely hope that this meets with your schedule.

Looking forward to seeing you soon, I am

Most cordially,

Q. Did you try to get in touch with Coach Bryant in Washington the day this letter was dictated?

A. No, sir, I did not.

Q. Well, I would like to place in the record the addresses of the other letters that were dictated on the date of March 5th.

Mr. Bennett: Marian, at this point, I am going to advise you that if your testimony would show that none of those other letters are related to the Bryant-Saturday Evening Post matter, you can refuse to testify on the ground that it is not related to the matter at issue.

Mr. Runzer: Of course, we take the position that the discovery of this correspondence may give us some indication of Dr. Rose's whereabouts which is of issue in the case.

Mr. Pritchard: And further we want to object on the grounds it is purely prejudicial. Sheds no light on the con-[fol. 1593] troversy here and Dr. Rose's private correspondence which in no way relates to the controversy here and would not be material in any sense of the word, we object to going into his private and personal business which in no way is concerned with the trial of this cause.

Mr. Bennett: My advice was based on the assumption that this other correspondence is not related to this matter and I assume that is the same basis of your objection.

Mr. Pritchard: Exactly.

Mr. Bennett: Then my advice still stands.

The Witness: That the only letters that relate to this case—

Mr. Runzer: Off the record.

(Off the record discussion.)

Q. Will you state the names of the addressees of the other letters that Dr. Rose dictated on the day of March 5th?

Mr. Pritchard: We re-interpose the same objection and I advise you that you certainly don't have to answer the question unless the Court tells you to.

Mr. Bennett: I advise you can refuse to answer this [fol. 1594] question on the ground that your testimony would not bear any relationship to the matter at issue.

Mr. Pritchard: Purely a private correspondence of Dr. Rose. It is not fair for us to question with whom he is corresponding.

Q. Would you read from your notes the body of the 30 other letters that were dictated on March—

Mr. Bennett: Once again I advise you can refuse to answer this question on the ground that your response would bear no relationship to the matters at issue and are concerned with the private business of Dr. Rose as President of the University.

Q. Would those letters, when transcribed, show the date of their transcription?

Mr. Bennett: You can answer the question.

A. Yes, they would.

Q. All right. Now, I will ask you to produce the transcribed copies of those letters.

Mr. Bennett: Once again, I advise you you can refuse to produce the transcribed copies of the 31 other letters on the ground they have no bearing on the matter at issue and only concern Frank Rose as President of the University.

Q. Do you have available a copy of the letter of Mr. Moore that you previously read from?

Mr. Bennett: You can answer.

A. Yes, sir, I do.

[fol. 1595] Q. Do you have any objection to showing us that?

A. No, sir.

Mr. Runzer: Let the record show that the witness is leaving the room to obtain a copy of the letter.

(Witness leaves room.)

Mr. Runzer: Let's identify the notes as Defendant's Exhibit 1, and we will make this two. Mr. Reporter, would you mark the notebook as Defendant's Exhibit No. 1 to Mrs. Park's deposition?

Mr. Bennett: Now, let's go off the record, if I might.

Mr. Runzer: Sure.

(Off the record discussion.)

Q. Mrs. Park, you were subpoenaed to bring here today your notebook. Is that the notebook in front of you?

A. It is.

Q. Would you hand it to me, please, ma'am?

Mr. Bennett: I will advise you that you can refuse to hand to him the full notebook providing your testimony would show that only the two letters previously referred to have any bearing on the matters at issue and that the others are concerned with the other responsibilities and private affairs of Dr. Rose.

Mr. Pritchard: And I want to suggest to you, in view of [fol. 1596] the attorney's attitude about it to take it away, it would be a mistake on your part to hand it to him and I will so tell the Judge.

Q. Do you refuse to give me the book that has been subpoenaed?

Mr. Bennett: I advise you that you have the right, if you choose to do so, and I have advised you on the ground which you refuse to do so.

The Witness: Just the two letters that concern this case, the one to Dr. Aderhold and the one to Commissioner Moore.

Q. Have you looked through that entire book? Can you state here and now that those are the only two letters that concern the Butts-Bryant incident?

A. I have looked through the transcription of the fourth and the fifth. The next date is the 14th. I have not looked at that.

Q. Have you looked at any time preceding the 4th?

A. I believe that's the first transcription in the book.

Q. And you do not refuse on the advice of counsel to hand me that book that was subpoenaed here today?

Mr. Bennett: You have that right under my advice to you.

A.* Except for the two letters, I refuse to do so.

Q. Will you hold the book, since it's been subpoenaed, I ask you to hold it until the judge makes a determination.

A. Yes, sir, indeed I will.

Q. And you will see that no one else will take it?

A. Yes, sir.

Q. Where will you keep it?

A. I will lock it in my desk.

[fol. 1597] Mr. Runzer: Off the record.

(Off the record discussion.)

Mr. Runzer: And you refuse us the right to mark the exhibit, Exhibit 1, not to look at, but have it marked?

Mr. Bennett: At this point I would remind you of your right to refuse to offer the entire notebook in response to the question based on the assumption that the entire book would reveal the only two letters that you have testified to. If you are not certain of that and you cannot state that your testimony would so show, you should now examine the letters from the 14th on in order to make certain that the position you have taken, that you refuse to produce the entire notebook is well taken.

Mr. Pritchard: And I suggest you do it now.

Mr. Bennett: Let the record show that she is now examining that portion of her notebook from March 14th, '63, to the end.

The Witness: This is a letter here, Mr. Bennett, that Dr. Rose received expressing confidence in Coach Bryant.

Mr. Bennett: Any response to that sort of letter?

The Witness: Yes, sir.

[fol. 1598] Mr. Bennett: That is a letter related to the Coach Bryant-Saturday Evening Post affair which will be the third one.

Mr. Runzer: Will you permit her to testify to that, details of that letter?

Mr. Bennett: I wouldn't advise her not to, no, sir.

Q. What is the date of that letter?

A. I should put it on every page, shouldn't I? I think it is the 22nd. The 22nd of March.

Q. 1963?

A. Yes, sir.

Q. Who is the letter addressed to?

A. Dr. Harold G. Martin

Minister

Mount Vernon Methodist Church

2400—24th Avenue North, Box 5281

Birmingham 7, Alabama.

You already have a copy of this letter which was in the letters I carried to Birmingham.

Q. Will you read it into the record now, please, ma'am?

A. Dear Harold:

I received your good letter of March 20th and appreciate the kind things you had to say regarding your confidence in Coach Bryant. There is no doubt in my mind that Coach Bryant has represented the University of Alabama in the finest way and that this is an effort on the part of the Saturday Evening Post to try to destroy him.

[fol. 1599] Because the Georgia people made so much over the fact of Mr. Burnett taking a lie detector test, Paul Bryant asked on his own to take the test in order that there would be no doubt regarding the whole incident.

Thanking you for writing me and wishing everything for you, I am

Most cordially,

Frank A. Rose.

Q. I assume the witness is still looking through the letters.

A. Yes, sir.

Mr. Bennett: Yes.

A. This is another letter of which you have a copy in your possession.

Q. The date of the letter, please, ma'am?

A. The 22nd. Was that the last date I gave you? Yes, March 22nd.

Q. Yes, ma'am. Who is it addressed to?

A. Mr. J. N. Groninger.

Q. All right. Would you read that?

A. Mr. J. N. Groninger

563 Downer Place

Aurora, Illinois

Dear Mr. Groninger:

I received your letter of March 18th and I appreciate your writing me regarding the recent story in the Saturday Evening Post. Coach Bryant and Coach Butts have entered suits against the Saturday Evening Post that will involve [fol. 1600] Mr. Burnett and I have no doubt in my mind that they are going to win their cases.

Thanking you for your—it doesn't look like a letter, I can't read what it is, wishes. May I continue reading now?

Q. Yes.

A. Here is another one, same date, March 22nd.

Mr. Stephen H. Alex

Town Center Plaza

1000—6th Street Southwest

Washington 24, D. C.

Dear Stephen:

I received your gracious letter of March 18 and it was a real pleasure hearing from you again. I can think of no better group I would rather have behind me at this time than the Dragoons, D-r-a-g-o-o-n-s. This is a very personal letter, because they are the finest damn people I know anywhere, particularly at times like this.

The whole thing is beginning to clear up and from three separate—there is a word here I can't read, investigations, it appears that an effort has been made by a sports writer to take his vengeance out on Coach Bryant that has been building up over a period of years through a national magazine. Great damage has been done to Coach Bryant and the University but we are getting so much support from other national magazines and people across the country it may be that we can reclaim some of our prestige.

Thank you for your good letter and hoping to see you sometime soon, I am

[fol. 1601] Most cordially. Now, we start backwards. Another letter on the 22nd to the Honorable Gessner T. McCorvy.

Honorable Gessner T. McCorvy
P. O. Box 1070
Mobile, Alabama.

Mr. Bennett: Could the record at this point show that Mr. McCorvy is Chairman Pro-Ten with the University of Alabama?

Mr. Runzer: Certainly. No objection.

A. Dear Mr. McCorvy:

I received your letter of March 20th regarding Bear making the proposed announcement that he and Coach Butts did not talk on the telephone and this has been discussed with Mr. Winston McCall and Coach Bryant on

the day we made our television appearances. We discussed it at great length and Mr. McCall thought it would serve the best interest of Bear's case if nothing more was said than had been said at the present time. However, I will discuss this with Bear today and if he should decide to go ahead I'm sure you will hear about it.

Thanking you for calling this to my attention, I am

Most cordially,

Frank A. Rose.

[fol. 1602] Another letter on the 22nd.

Mr. Edward P. Curkuff

11 Kerney Street

Oneonta, New York

Dear Mr. Curkuff:

I received a copy of your letter to the Saturday Evening Post dated March 31st in which you praised them for their story in the March 23rd issue. You may be assured that Mel Allen, who has been one of our active alumni does not share the view which you have taken and I am disappointed that alumnus of the University of Alabama which subscribes to the philosophy that a man is guilty before his defense has been offered.

I assure you that five responsible agencies of our Federal Government, the State of Alabama, and the State of Georgia have been conducting a thorough investigation and as of this date have found nothing that would indict Coach Paul Bryant or Coach Wallace Butts in rigging, fixing, or betting on a football game.

I think you should also know that Coach—now, I have Coach B here, at this date, I don't remember which it was. Has a \$500,000 libel suit against the Saturday Evening Post on an article that was printed last year that was without foundation or fact and a deliberate effort has been

made—that's Coach Bryant, and are being made to try to fight this case in public to the destruction of the character of Coach Bryant and the integrity of the University.

[fol. 1603] Hoping you will follow the coming events rather carefully in order that you might know the whole truth, I am

Sincerely yours,

Frank A. Rose.

Another letter the same date, the 22nd.

Mr. Marvin J. McGarity
1416 Sutherland Place
Birmingham 9, Alabama

Dear Mr. McGarity:

I received your good letter of March 24th and I want you to know my deepest appreciation for the kind things you have to say about Coach Bryant. All of us feel the same way you do about him and there is no doubt in my mind but that he is one of our finest citizens.

Thanking you for sharing your letter with me, I am

Most cordially.

Now, we go into a long line of letters answering letters about Coach Bryant, copies of which you have. Would you like me to read them just the same?

Q. Yes, I would.

A. Mr. Eddie Leitman.

Q. This is also March 22nd?

A. Yes, sir.

[fol. 1604] Mr. Eddie Leitman
President Student Government Association
University of Alabama
University, Alabama.

Dear Mr. Leitman:

I received your good letter of March 21st enclosing the resolution on behalf of Coach Bryant and I want you to know my deepest appreciation for this action. I am sure your expression of confidence in support of Coach Bryant will mean a great deal to him as it does to all of us who served as his colleagues.

Thanking you for this resolution, I am

Most cordially yours.

Same day:

Honorable George Huddleston, Jr.
Member of the United States House of Representatives.
Washington, D. C.

My dear George:

I received your memorandum with your remarks to the House of Representatives and I want you to know my appreciation for this good thing you have done on behalf of Coach Paul Bryant and the University of Alabama. We will forever remain indebted to you.

Thanking you again for your many services, I am

Most cordially.

[fol. 1605] Another letter the same date.

Dr. Marten ten Hoar
4 Forest Lake Drive
Tuscaloosa, Alabama

Mr. Bennett: At this point let the record show that Dr. ten Hoar is Dean Americus for the College of Arts and Sciences for the University of Alabama.

A. That's spelled with a small t-e-n and capital H-o-a-r. Marten is spelled M-a-r-t-e-n.

My dear Marten:

I received your letter of March 25th and I assure you it came at a time which was a most helpful period. I don't believe I have ever gone through a day as I did yesterday and I hope I shall not have to go through another one in the next few months. However, I believe that everything worked out pretty well and we are about to find the "rat in the woodpile" in Atlanta.

Hoping all is going well with you and Marie and we can get together sometime soon, I am

Most cordially.

On the same day:

Honorable William Inge Hill
P. O. Box 116
Montgomery, Alabama

[fol. 1606] My dear Inge:

I received your gracious letter of March 25th enclosing the resolution from the Montgomery County Alumni Association and I want you to know my deepest appreciation for this confidence you have expressed in Coach Paul Bryant and me. Everyday we continue our investigation confirming the innocence of Coach Bryant and we feel that we are about to get hold of some information that will help us to understand the whole problem.

Thanking you for your continued loyalty and interest in the University, I am

Most cordially.

Another letter on the same day:

Mrs. Elizabeth Gaines Jackson
526—looks like W-i-l-l-a-m-i-n-t, and I don't have the whole town here. Looks like River Falls, I don't know where the town of River Falls is.

Dear Mrs. Jackson:

Q. Excuse me, is that an Alabama town?

A. I don't think so, no, sir. Do you know, Mr. Bennett?

Mr. Bennett: I can't answer.

A. Excuse me. I don't believe it is an Alabama town.

[fol. 1607] Dear Mrs. Jackson:

I received your letter of March 21st enclosing a copy of your letter to the Editor of the Saturday Evening Post and I have never read anything that was finer nor more incensive than you have written.

I want you to know that we have found nothing after four and a half weeks of investigation that would reveal that Coach Bryant has done anything wrong or unethical. There is no doubt in my mind but that this is an effort to try to destroy an outstanding man.

Thanking you for speaking in our behalf, I am

Most cordially.

This is a letter dated the 29th of March.

Honorable Fred W. Nichols

Circuit Solicitor

City of Tuscaloosa. I don't have it down here. Mr. Bennett—

Mr. Bennett: I can't respond.

A. Tuscaloosa, Alabama.

My Dear Fred:

Is it possible for me to convey to you my deepest and most profound appreciation for taking the time to come to Birmingham and administer the Polygraph test to Coach Bryant and then making a special effort you made yesterday to come to Montgomery to testify before the

[fol. 1608] Legislative Committee. In all my years of public service I have met no one in whom I have greater confidence or respect more than I do you and it was on the basis of this confidence that I informed Attorney General Cook of Georgia that it is my conviction that there is no man better qualified or more honest that could have improved upon the Polygraph test that you gave Coach Bryant. He too was impressed when I informed him about you but apparently let his politics alter his judgment and the integrity.

In order to keep our records official, I would appreciate your sending me a statement for services rendered as I not only feel strongly that you should be compensated but I believe it will help our cause with the Southeastern Conference to keep it professional.

Thanking you again for the good thing you have done on our behalf and on the behalf of justice and fairness, I am

Most cordially yours.

There is a letter on the 29th:

Mr. Ben A. Green, Editor
The Voice of the Tennessee Walking Horse
Shelbyville, Tennessee

Dear Mr. Green:

I received your gracious letter of April 1st enclosing a copy of your address and I want to express to you my deepest appreciation for this good thing you have done on behalf of Paul Bryant. All of us who know him know of [fol. 1609] his integrity and honesty and not have been shaken one bit by the political situation in Georgia.

I am passing on Kipling's quote "IF" for him to hang on his wall.

Thanking you again, I am

Most cordially.

This is a letter on April 9th:

Dr. Curtis Jones

Minister of the Union Avenue Christian Church
St. Louis, Missouri

Dear Curt:

I received your good letter of April 2nd regarding your recent luncheon discussion with Dr. Charles Allen Thomas and I appreciate your expressing concern to me regarding our present football investigation. Needless to say it's been a most difficult period for all of us but a great deal of light has come on the subject in the last few days when Dr. Carmichael, the President of an insurance company, in Atlanta revealed that he saw the brief notes taken by Mr. Burnett who accused Coach Butts and Coach Bryant of rigging the football game, stating that the notes were not the same as those in the Saturday Evening Post article and that even Mr. Burnett confessed to him that the two men were discussing illegal defenses which were brought about because of football rule changes. The Justice Department, the Commissioner of the Southeastern Conference and I are now of the opinion that this was an effort on the part of Mr. Furman Bisher, sportswriter, Atlanta Constitution, against whom Coach Bryant has a \$500,000 suit, to attempt to blackmail and smear Coach Bryant.

Coaches like businessmen, college presidents, and preachers, discuss techniques, tickets, football players and anything else pertaining to their business and this has been confirmed by ten of the leading coaches in America that there was nothing in the notes that would confirm anything illegal or unethical.

Hoping that you will keep this confidential until I make my final report, I am

Most cordially.

Mr. Bennett: Off the record.

(Off the record discussion.)

Mr. Runzer: Show him these intervals that Mrs. Park is referring to her notebook. I think it is only fair to her to show that.

The Witness: That's it. Now, just let me start here at the beginning and it won't take but a minute to do that. This is on the 22nd of February. That's it.

Q. Now, do you have with you the notebook that contains the letters for the first days of March which are not contained in that book? That book started with March 4th, you told me.

A. No. This book starts with the 22nd of February.

Q. And there are no other letters except the ones that you told us, except the ones that are connected with the Butts-Bryant incident?

[fol. 1611] A. That I have in my possession. On the last deposition I gave, I stated I do not ordinarily keep notebooks but for a few months. I think I have them now through August.

Q. And this notebook runs from February—

A. 22nd.

Q. Until—

A. April 16th.

Q. Now, I want to identify this as Defendant's Exhibit No. 1.

(Whereupon, said letter was received in evidence and marked "Defendant's Exhibit No. 1," and is attached to the original deposition of Mrs. Park.)

Q. What is the date in April?

A. Sixth.

Q. Mrs. Park, I show you a letter marked Defendant's Exhibit No. 1, which is a copy of a letter dated March 6th from Dr. Rose to Mr. Bernie Moore. Was that a copy

of a letter that was dictated to you by Dr. Rose and transcribed by you?

A. Yes, sir.

Q. And dictated on the 5th and transcribed on the 6th?

A. Yes, sir.

Q. Where in the order does that come? The letter to Dr. Aderholt was the fifth letter of that day?

A. Yes. Now, I have lost my place. Letter to Dr. Aderholt was the fifth and that is No. 16.

Q. Is this your customary initial on the letter, M/H/P?

A. Yes, sir.

Q. Does anyone else at the University use those initials that you know of?

[fol. 1612] A. Not to my knowledge.

Q. And, of course, F.A.R. stands for Frank A. Rose?

A. Yes, sir.

Q. Dr. Rose told us on the week beginning February 24, 1963, he was out of town most of that week; do you recall that?

A. No, sir, I don't. I will have to look at Dr. Rose's calendar.

Q. Do you recall previous to him writing Dr. Aderhold that he received a letter from Mr. Bryant?

A. No, sir.

Q. If such a letter came in, would you merely place it on his desk for his attention when he came back?

A. Yes, sir.

Q. Would you necessarily even read it?

A. I would unless it were marked personal or confidential.

Q. Does this office date stamp the receipt of letters?

A. No, sir, we don't.

Q. Excuse me one moment, please.

Off the record.

(Off the record discussion.)

Mr. Runzer: I think that will be all.

Mr. Bennett: Off the record a moment.

(Off the record discussion.)

Mr. Runzer: It is agreed that the notes relating to those letters which Mrs. Park read us as relevant events to the Butts-Bryant incident will be produced, photocopied, and [fol. 1613] the other notes will be held by Mrs. Park pending a determination by the Court.

Mr. Pritchard: Correct.

Mr. Runzer: All right, that's all.

Further deponent saith not.

Certificate

State of Alabama,
Jefferson County.

I, Carmen Zegarelli, United States District Court Reporter, Birmingham, Alabama, do hereby certify that I reported in shorthand the foregoing deposition of Mrs. Marian H. Park at the time and place stated in the caption hereof; that said witness was first duly sworn to speak the truth, and nothing but the truth; that I later reduced my shorthand notes to typewriting, or under my supervision, and the foregoing pages, numbered three through 48, both inclusive, contain a full, true and correct transcript of the testimony of said witness on said occasion.

I further certify that I am neither of counsel nor of kin to any parties to said cause, nor in any manner interested in the result thereof:

Official Court Reporter

[fol. 1614]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 21491

CURTIS PUBLISHING COMPANY, Appellant,
versus
WALLACE BUTTS, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

Before Brown, and Bell, Circuit Judges, and Spears, District Judge.

ORDER—Filed August 21, 1964

By the Court:—

It Is Ordered that the letter-request of counsel for appellee to dispense with the requirements of Rule 24 (2) (e) be, and the same is hereby granted.

[fol. 1615]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Title omitted]

MINUTE ORDER RE ARGUMENT AND SUBMISSION—
October 8, 1964

On this day this cause was called, and after argument by Welborn B. Cody, Esq., Harold E. Abrams, Esq. and Philip H. Strubing, Esq., for appellant, and by Allen E.

Lockerman, Esq., and Wm. H. Schroder, Esq., for appellee,
was submitted to the Court.

[fol. 1616]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21491

CURTIS PUBLISHING COMPANY, Appellant-Appellee,
versus
WALLACE BUTTS, Appellee-Appellant.
(AND REVERSE TITLE)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

Before Rives and Brown, Circuit Judges, and Spears, Dis-
trict Judge.

OPINION—July 16, 1965

Spears, District Judge: This is a libel suit. Curtis Pub-
lishing Company¹ published an article in the March 23,
1963 issue of the Saturday Evening Post² entitled "The
[fol. 1617] Story of a College Football Fix", characterized

¹ Hereinafter referred to as either "Curtis", "defendant" or the
"Post".

² Also referred to herein as the "Post".

by the Post in the sub-title as "A Shocking Report of How Wally Butts and 'Bear' Bryant Rigged a Game Last Fall."

On March 25, 1963, Wally Butts,³ former Athletic Director of the University of Georgia, instituted this action against Curtis. In August, 1963, the case was heard before a jury, which returned a verdict against Curtis for \$60,000 general and \$3,000,000 punitive damages. Conditioned upon the failure of Butts to remit that portion of the award for punitive damages in excess of \$400,000, the trial court granted Curtis' motion for a new trial. At the same time, Curtis' motion for judgment notwithstanding the verdict was denied. On January 22, 1964, after Butts had filed a remittitur, Curtis' motion for new trial was denied, and judgment for Butts in the amount of \$460,000 was entered. Thereafter, Curtis filed motions for new trial under Rule 60(b), F.R.Civ.P., which were denied on April 7, 1964. This appeal is taken from the judgment of January 22, 1964, and from the trial court's denial of Curtis' motions for judgment notwithstanding the verdict and for new trial. We affirm.

Curtis publishes various magazines including the Post. Prior to the publication of the story in question, the editor-in-chief, undoubtedly hoping to attract more readers, had decided to "change the image" of the magazine by making it an "expose" type, and embarking upon a policy of "sophisticated muckraking", in order "to provoke people" and "make them mad".⁴

[fol. 1618]. The article⁵ involved was based upon a claim by one George Burnett that on September 13, 1962 he had

³ Sometimes hereinafter referred to as "Butts" or "plaintiff".

⁴ See note 25, *infra*.

⁵ The following editorial comment was inserted at the beginning of the story:

"Not since the Chicago White Sox threw the 1919 World Series has there been a sports story as shocking as this one. This is the story of one fixed game of college football.

"Before the University of Georgia played the University of Alabama last September 22, Wally Butts, athletic director of

accidentally overheard, and made notes of, a long-distance telephone conversation between Butts and "Bear" Bryant, football coach at the University of Alabama, in which Butts divulged certain information about football plays the University of Georgia would use in its opening game against Alabama. Georgia was subsequently defeated 35-0.

About four months after the alleged telephone conversation Burnett contacted various people, including Georgia football coach Johnny Griffith, and then decided to tell his story to the Post. A writer, Frank Graham, Jr., was assigned by the Post to investigate and write the story, and [fol. 1619] an Atlanta sports editor was retained to advise him. Graham never saw Burnett's notes, as they were at the time in the possession of Georgia school officials; he did not interview a witness known by him to have allegedly discussed the notes with Burnett on the same day the telephone conversation purportedly took place; he never viewed the game films; and neither he nor anyone else on behalf of the Post ever contacted Butts or Bryant. He agreed that both he and Curtis knew publication of the article "would ruin Coach Butts' career".

Georgia, gave Paul (Bear) Bryant, head coach of Alabama, Georgia's plays, defensive patterns, all the significant secrets Georgia's football team possessed.

"The corrupt here were not professional ballplayers gone wrong, as in the 1919 Black Sox scandal. The corrupt were not disreputable gamblers, as in the scandals continually afflicting college basketball. The corrupt were two men—Butts and Bryant—employed to educate and to guide young men.

"How prevalent is the fixing of college football games? How often do teachers sell out their pupils? We don't know—yet. For now we can only be appalled.—THE EDITORS."

In the story itself it is stated, among other things, that "(t)he Georgia players, their moves analyzed and forecast like those of rats in a maze, took a frightful physical beating". Georgia coach Johnny Griffith was quoted as saying bitterly to a friend, "I never had a chance." The next sentence read: "When a fixer works against you, that's the way he likes it."

On March 11, 1963, eleven days before the article was published, Curtis was informed by telegram and letter, both sent by Butts' counsel, of the "absolute falsity of the charges" contained in the proposed story. The record does not disclose that any additional investigation was initiated, and the telegram and letter went unanswered. In addition, a long-distance telephone appeal that the article not be published, made by Butts' daughter prior to publication, was rejected. After the article was published, Curtis refused a demand that it publish a retraction.

The Post took the position from the beginning that the statements made in the article concerning Butts were true, and that because of their nature it had exercised great care by thoroughly checking every significant source of information as to their truthfulness and accuracy, in advance of publication.

Curtis chose not to use as a witness either the author of the article or any of its editors who had made contributions to the article after it had been submitted. Nor did it [fol. 1620] use the Atlanta sports editor who had assisted in the preparation of the story. As one of its principal witnesses it called upon George Burnett, who was known by Curtis to have been convicted of writing bad checks, and to be on probation at the time he claimed to have listened in on the conversation.

Both Butts and Bryant testified. Each emphatically denied the charges contained in the article and stated that there was never any conversation between them having as its purpose the fixing or rigging of any football game. Several football players, past and present, expressed their opinions to the effect that the outcome of a football game cannot be rigged or fixed without participation by the players themselves, and that there is no way in which two coaches can rig or fix the outcome of a football game without the players' knowledge. Other "experts" stated their opinion that the information contained in the "so-called" Burnett notes would not be of any assistance at all to the University of Alabama in preparing for its game

with the University of Georgia. In several instances Butts' witnesses denied direct quotations attributed to them in the article.

In an opinion written by the district judge the facts are stated in some detail,⁶ and no useful purpose could be served by repeating them here, although portions thereof pertinent to specific issues later discussed may be utilized. It is significant, however, at this point, to say that in view of the verdict it rendered, the jury undoubtedly accepted [fol. 1621] Butts' version that the story was "willfully, maliciously and falsely" published, as a result of which he has suffered substantial injury to his "peace, happiness and feelings", as well as to his "honor, reputation and integrity". As the trial judge saw it: "The article was clearly defamatory and extremely so. . . . The guilt of the defendant was so clearly established by the evidence in the case so as to have left the jury no choice but to find the defendant liable."⁷ We wholeheartedly agree with that appraisal.

The Issues Presented

Curtis submits twenty-eight specifications of error which are argued in its brief under ten propositions. The issues involved are: (1) Was the article libelous per se? (2) Does the court's judgment violate Curtis' rights under the First, Fifth and Fourteenth Amendments? (3) Did the arguments of Butts' counsel, not objected to at the trial, require a new trial? (4) Did the court err in excluding certain testimony offered to impeach the credibility of Butts and the witness John Carmichael? (5) Were the extrajudicial statements of George Burnett, and the statements made to him by third person, properly excluded? (6) Did the trial court commit plain error in instructing the jury? (7) Did the trial court err in refusing to charge

⁶ Butts v. Curtis Publishing Co. (N.D. Ga. 1964), 225 F.Supp. 916.

⁷ Id. at 919.

the jury that it should construe Butts' testimony "most strongly against him"? (8) Did the trial court err in refusing to charge the jury that it should disregard the entire testimony of any witness whom it found to have knowingly and wilfully testified falsely? (9) Does the "newly [fol. 1622] discovered evidence" offered in Curtis' motion under Rule 60(b), F.R. Civ. P. require a new trial? (10) Is the award of punitive damages so excessive that it cannot be cured by the remittitur?

The Article as Libelous Per Se

The trial judge charged the jury that the article was libelous per se. This was objected to by Curtis on the ground that Butts was not actively engaged in the profession of a football coach at the time of publication, and, that no special damage was shown.⁸ Curtis took the same position in its motions for directed verdict and for judgment notwithstanding the verdict.

Curtis' contention in this regard cannot be sustained. This is a *libel* suit as distinguished from a *slander* suit.⁹ Under Georgia law, a plaintiff may recover in a libel action where the defamation is apparent from the writing itself, without the necessity of alleging or proving special damages,¹⁰ and it is not necessary that he be engaged in the

⁸ In support of this proposition, Curtis cites—*Weatherholt v. Howard*, 143 Ga. 41, 84 S.E. 119 (1915); *Van Epps v. Jones*, 50 Ga. 238 (1873); *Mell v. Edge*, 68 Ga. App. 314, 22 S.E. 2d 738 (1942); *Haggard v. Shaw*, 100 Ga. App. 813, 112 S.E. 2d 286 (1959); and *Estes v. Sterchi Bros. Stores*, 50 Ga. App. 619, 179 S.E. 222 (1935). These cases, however, appear to be "delinquent debtor cases" referred to in note 11, *infra*.

⁹ Ga. Code Ann. § 105-701 (libel), § 105-702 (slander).

¹⁰ *Floyd v. Atlanta Newspapers, Inc.*, 102 Ga. App. 840, 117 S.E. 2d 906 (1960), the leading case in Georgia, states that words which, if merely spoken, would not be actionable in absence of special damage, may be libelous when printed if false and tend to injure reputation and bring one into public hatred, contempt or ridicule. Ordinarily, only general damages need be alleged in an action for libel.

[fol. 1623] pursuit of his trade, business or profession at the time of publication.¹¹

But even if the law necessitated a showing that Butts was actively engaged in the profession of a football coach [fol. 1624] at the time of publication, we think this requirement has been satisfied.

¹¹Ga. Code Ann. § 105-701, defines libel as the "false and malicious defamation of another, expressed in print . . . tending to injure the reputation of an individual and exposing him to public hatred, contempt, or ridicule . . .", without the requirement that the charges be calculated to injure one in his trade, office or profession. A newspaper libel is described in Ga. Code Ann. § 105-703, as being "any false and malicious defamation of another in any newspaper, magazine or periodical tending to injure the reputation of any individual and expose him to public hatred, contempt, or ridicule", again without the requirement that the charges refer to one's trade, office or profession. Only in the area of slander is a reference to one's trade, office or profession required. Ga. Code Ann., § 105-702.

The case of *Floyd v. Atlanta Newspapers, Inc.*, supra, note 10, in its definitive statement of the Georgia law of libel explains that written words are sufficient to constitute libel per se if they tend to bring a man into public hatred, contempt or ridicule. Damages will be presumed from the nature of the words themselves and their harmful effect and no proof of special damages is necessary. Where the only possible construction is that the words are libelous per se, upon proof thereof, the only remaining question for the jury is that of damages. See also Restatement of the Law Second, Torts, Tentative Draft No. 11, April 15, 1965, Section 569, wherein Georgia is named as one of the majority of states following this rule, and, as explained in the notes to Restatement of the Law of Torts, 1938, Vol. III, Sec. 569, Comment e, pp. 168-9, it may be libelous to impute misconduct in one's trade, etc., although he is at the time no longer engaged in the pursuit of the trade, business or profession.

Curtis cites many cases in support of its position (see note 8, supra). However, these are part of a group of cases known in Georgia as the "delinquent debtor cases" and, as explained by the *Floyd* case, stand in a class by themselves, and have no bearing on causes of action other than those involving charges that one owes a debt and refuses to pay, or owes a debt long past due. In this isolated situation the charge is, as a matter of law, uniformly held in Georgia, not libelous per se, and it is in these cases that Curtis finds language to the effect that falsely spoken or written words that do not contain a charge made in reference to one's trade, office or profession are not actionable without proof of special damages.

The story was purchased by Curtis on February 22, 1963. Butts resigned as Athletic Director effective February 28, 1963. The article was published in the March 23, 1963 issue of the Post. Thus it may be assumed that Butts was at least temporarily out of work on the day of publication, but it hardly follows that he had completely abandoned the coaching business.

Actually, Curtis admitted in its answer that Butts "has enjoyed a national reputation as a successful and respected member of the coaching profession", and that he "has been approached and offered employment as head football coach by several colleges and professional football teams in the country due entirely to his reputation as a successful member and leader in his profession." This admission, in and of itself, would indicate a recognition that Butts was still identified with some phase of football activities.

Upon Curtis' insistence, its second defense asserting that the statements contained in the article were true, was held to be a valid plea of justification. By interposing this plea, Curtis admitted a *prima facie* case,¹² but gained the valuable right to open and close. The complaint alleged that "plaintiff's career as a member of the football coaching profession had been ruined and destroyed by this scurrilous and contemptible defamation." (Emphasis supplied.) Without regard to any question as to whether the [fol. 1625] plea constitutes an admission that the remarks were made with malice, it is our view that it necessarily carries with it an admission, not only that the libelous statements were made by Curtis, but also that they were made in relation to Butts "as a member of the football coaching profession". Under all the circumstances, it is untenable to say that simply because Butts was temporarily out of

¹² See Ga. Code Ann. § 105-708 and § 105-1801; *Baldwin v. Davis*, 188 Ga. 587, 590, 4 S.E. 2d 458 (1939).

a job at the time of publication, he was not actively engaged in the coaching business as a means of livelihood.¹³

We hold that the trial court correctly charged the jury that the article was libelous per se, and that he did not err in denying Curtis' motions for a directed verdict and for judgment notwithstanding the verdict.

Curtis' Constitutional Rights

Curtis contends that the trial court's judgment violates and abridges its rights of freedom of speech and of the press guaranteed by the First, Fifth and Fourteenth Amendments to the Constitution of the United States. It relies upon the case of *New York Times Company v. Sullivan*, 376 U.S. 254, 84 Sup. Ct. 710, 11 L.Ed. 2d 686 (1964), decided subsequent to the trial of this case, in which it was held that in order for a public official in a libel suit to recover any damages he must prove that a statement against his official conduct was published "with actual malice—that [fol. 1626] is knowledge that it was false or with reckless disregard of whether it was false or not". 376 U.S. at 279-80. This holding, says Curtis, "drastically changed the constitutional principles applicable to libel actions", by announcing new safeguards which "make it manifestly clear not only that the rules of law which were applied in the trial of the instant case were unconstitutional, but also that the result reached by the jury is a patently unconstitutional result which cannot be permitted to stand".

Countering this, Butts says that the invocation of the constitutional defenses in libel cases has received emphatic and substantial attention by scholars and Courts over the

¹³ In the Missouri case of *Clark v. McBaine*, 299 Mo. 77, 252 S.W. 428 (1923), at 432, cited by Curtis, the Court stated that though the plaintiff "had been removed as a member of the faculty, . . . his profession, or means of a livelihood, was still that of a professor of law, and a writer of textbooks upon the law, and the gist of his damages . . . consisted of injury done to his standing as a professor and writer of law."

years; that the *Times* case resulted in no fundamental change of law, but merely gave new sanctions to a long standing rule; and that in any event, Curtis did not invoke those defenses even though they are more broadly stated in the Georgia law than in the *Times* case.¹⁴ Moreover, [fol. 1627] Butts emphasizes that the *Times*' constitutional grounds now asserted were not timely raised or preserved below. In fact, they were presented for the first time in the F.R.Civ.P. 60(b) motion filed on March 23, 1964, long after trial.

The record reflects that Curtis did not object to the trial court's instructions.¹⁵ The *Times* case was decided by the Alabama Supreme Court on August 30, 1962. A petition for writ of certiorari presenting constitutional questions identical to those now being urged by Curtis, was filed in the United States Supreme Court on November 21, 1962, four months prior to the filing of the complaint in this

¹⁴ In support of his position, Butts cites: "Justice Black and First Amendment 'Absolutes'; A Public Interview," 37 N.Y.U.L. Rev. 349 (1962); C. L. Black, Jr., "Mr. Justice Black, the Supreme Court, and the Bill of Rights," Harpers, February, 1961, p. 63; *Caldwell v. Crowell-Collier Pub.Co.*, (5th Cir. 1947), 161 F.2d 333; *Sweeney v. Schenectady Union Pub.Co.*, (2d Cir. 1941), 122 F. 2d 288, aff'd 316 U.S. 642 (1942); *Henry v. Collins*, 158 So. 2d 28 (Miss. 1963); *Louisiana v. Garrison*, 244 La. 787, 154 So. 2d 400 (1963); *Louisiana v. Moity*, 245 La. 546, 159 So. 2d 149 (1963); and other pre-*Times* defamation cases. He points out that the Supreme Court in *Times* recognizes that "a like rule" has existed for a number of years in some state courts; that the Kansas Supreme Court, in *Kennedy v. Mid-Continent Telecasting, Inc.*, 193 Kans. 544, 394 P. 2d 400 (Kan. 1964), noted that the *Times* decision requires no change in the law; that the trial court said (note 23, *infra*) that Georgia provides this "like rule" by a statute granting a qualified privilege for "comments upon the acts of public men in their public capacity and with reference thereto", citing Ga. Code Ann. § 105-709(6); and that privilege can be lost by proof of actual malice, citing Ga. Code Ann. § 105-710.

¹⁵ See Rule 51, F.R.Civ.P. Also see note 36, *infra*.

case on March 25, 1963.¹⁶ Certiorari was granted in the *Times* case on January 7, 1963. The jury verdict in the instant case was returned on August 20, 1963, and the trial court's judgment thereon was entered the same day. A Birmingham, Alabama law firm, which represented the New York Times in the case brought against it by Sullivan, also, together with Curtis' General Counsel, represented Curtis in a libel suit Coach Bryant had filed against it in the United States District Court at Birmingham, Alabama. A member of this law firm had sent information to Curtis about the alleged telephone conversation between Butts and Bryant, and had talked with the author, Graham, about the matter prior to publication of the story. The same lawyer, together with another member of the firm, [fol. 1628] sat (as did the General Counsel for Curtis) at Curtis' Counsel table throughout the trial of this case.¹⁷

While it is true that the Supreme Court did not decide the *Times* case until March 9, 1964, it would be contrary to reason and common sense to assume that there had not been, at all times during the pendency of this case, full communication among Curtis' counsel, particularly con-

¹⁶ We have examined the petition for writ of certiorari presenting the constitutional questions, and find that it was filed by the New York Times Company on November 21, 1962. The brief for respondent in opposition was filed on December 15, 1962, and petitioner's reply thereto was filed on December 29, 1962.

¹⁷ The Birmingham law firm of Beddow, Embry and Beddow, which represented the New York Times in the Supreme Court of Alabama, is also shown to be counsel for the Times in the Supreme Court of the United States. Mr. Roderick Beddow of that firm represented Curtis in the case of Paul Bryant v. Curtis Publishing Company, in the United States District Court in Birmingham, and both he and Mr. T. Eric Embry of that firm sat, along with the General Counsel of Curtis, Mr. Philip H. Strubing, at the Curtis counsel table throughout the trial of this case. Butts' brief states, without contradiction, that Mr. Beddow "initially sent them (Curtis) this information about the alleged telephone conversation and was a principal in the initial work of the author Frank Graham."

cerning trial strategy. The facts more than justify our conclusion that Curtis was fully aware when this suit was instituted, and certainly no later than the beginning of trial, that the constitutional questions it now argues had been for some time, and were still being, vigorously asserted in *Times*.

The Supreme Court said, in *Michel v. Louisiana*, 350 U.S. 91, 99, 100 L. ed. 83, 76 S. Ct. 158 (1955), that "(t)he test (in making a claim to a constitutional right) is whether the defendant has had 'a reasonable opportunity to have the issue as to the claimed right heard and determined by the . . . court.'" It then cited the case of *Yakus v. United States*, 321 U.S. 414, 444, 88 L.ed. 834, 64 S.Ct. 660 (1944), for the proposition that "(n)o procedural principle is more [fol. 1629] familiar to this court than that a constitutional right may be forfeited . . . by the failure to make timely assertion of the right."¹⁸

¹⁸ *Michel v. State of Louisiana*, 350 U.S. 91, 76 S. Ct. 158, 100 L. ed. 83 (1955), involved a Louisiana statute requiring any challenge to the composition of a Grand Jury to be made before the end of the term of the Grand Jury, holding that the statute was not unconstitutional, and that since the petitioners had not, under that statute, made timely challenge to the constitutional composition of the Grand Jury, they waived any such right to so challenge the Grand Jury. The court announced that the test was whether the defendant had had a reasonable opportunity to have the issue as to the claimed right heard and determined by the court.

On the other hand, in the case of *Reece v. State of Georgia*, 350 U.S. 85, 76 S.Ct. 167, 100 L. ed. 77 (1955), decided at the same time as the *Michel* case, the state court had refused to consider the defendant's motion to quash the indictment filed before his arraignment on the ground of the composition of the Grand Jury, because, by Georgia practice, objections to the Grand Jury must be made before the indictment is returned. The court held that there had been no waiver there, and that due process had been violated, because defendant, a semi-illiterate Negro, had no counsel until the day after his indictment, pointing out that "the right to object presupposes an opportunity to exercise that right."

In *Kewanee Oil and Gas Co. v. Mosshamer*, (10th Cir. 1932), 58 F.2d 711, where the constitutionality of a state statute was

[fol. 1630] It cannot be said that this case falls within the category of those cases cited by Curtis¹⁹ which hold that if subsequent to a trial or hearing, but before a final decision by the trial or appellate court, the fundamental law is changed, it is the duty of the court to apply the law as amended. Those were "exceptional cases", where there was no waiver and the court was satisfied that to do otherwise would result in a "plain miscarriage of justice". In this case, however, even if it is assumed that the basic law has been changed, the situation is quite different. For whatever tactical or other reason²⁰ Curtis sat back and failed to carry the constitutional torch before verdict and judgment, the fact remains that it was charged with knowledge,

raised on appeal, the court stated that "if the constitutionality of a statute is not raised in the pleadings ordinarily it may not be raised at the trial."

Other cases decided by district courts, and holding that constitutional questions ordinarily must be raised at the trial, are: *Alexander v. Daugherty* (D.C. Wyo. 1960), 189 F. Supp. 956 (only where failure to raise the constitutional question at the trial was due to ignorance, duress or other reason for which petitioner could not be held responsible, may redress be had, and then if "it is made to appear that there had been such gross violation of constitutional right as to deny the defendant the substance of a fair trial"); *Houck v. Eastchester P.U. District* (D.C. Alaska 1952), 104 F. Supp. 588; *Mount Tivy Winery v. Lewis* (N.D. Cal. 1942), 42 F. Supp. 636; and *White Cleaners and Dyers v. Hughes* (W.D. La. 1934), 7 F. Supp. 1017.

¹⁹ *Ziffrin, Inc. v. United States*, 318 U.S. 73, 87 L. ed. 621, 63 S. Ct. 465 (1943); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 2 L. ed. 49 (1801); and *Hormel v. Helvering*, 312 U.S. 552, 85 L. ed. 1037, 61 S. Ct. 719 (1941), an unusual case in which the Supreme Court allowed the Tax Commissioner to assert for the first time on appeal in the Court of Appeals the taxability of income under another section of the code, but stated that "ordinarily an appellate court does not give consideration to issues not raised below . . . (but) there may be exceptional cases where injustice may otherwise result except where express waiver is given."

²⁰ Butts thinks it can be inferred that "defendant never considered plaintiff to be in any class of 'public men' so as to make the defense available."

through its interlocking battery of able and distinguished attorneys, of the issues involved in the *Times* case, and was afforded every reasonable opportunity to have those same issues heard and determined by the trial court in the case at bar. What the Supreme Court would, or might, hold in *Times* was not decisive. What was important was that Curtis had to invoke any constitutional claims in an appropriate way, and at an appropriate time. Considering the resources of Curtis, both practical and legal, and the contemporary awareness of constitutional rights pervading [fol. 1631] even problems of local jurisprudence, Curtis' complete and utter silence amounted to "an intentional relinquishment or abandonment of a known right or privilege."²¹

Without expressing any opinion as to whether *Times* fundamentally changed the substantive law applicable to libel cases, or whether the charge on malice given by the trial court was adequate under *Times*,²² or whether Butts

²¹ *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L. ed. 1461 (1938).

²² The trial court's charge on malice was, in part, as follows:

"At this point, I think it is well that I should explain to you the meaning of malice under the law of defamation. Malice, in the law of defamation, may be used in two senses. First, in a special or technical sense to denote absence of lawful excuse or to indicate absence of privileged occasion. Such malice is known as implied malice or malice in law. There is no imputation of ill will to injure with implied malice. Secondly, malice involving intent of mind and heart or ill will against a person is classified as express malice or malice in fact . . .

"Where it is established that the defendant was inspired by actual malice in the publication of the defamatory matter, the jury, in its discretion, may, but is not required, to award punitive damages. As previously stated to you, actual malice encompasses the notion of ill will, spite, hatred, and an intent to injure one. Malice also denotes a wanton or reckless indifference or culpable negligence with regard to the rights of others. The purpose of punitive damages is to deter the defendant from a repetition of the offense and is a warning

was the kind of "public official" contemplated by *Times*,²³ [fol. 1632] or whether a reversal might otherwise be required if the constitutional issues had been timely pre-[fol. 1633] sented, we hold that Curtis has clearly waived

to others not to commit a like offense. It is intended to protect the community and has an expression of ethical indignation, although the plaintiff receives the award. The plaintiff charges that the column was written and published both with actual malice and in utter and wanton disregard of his rights"

²³ In a second opinion dated April 7, 1964 (See *Butts v. Curtis Publishing Company* (N.D. Ga. 1964) _____ F. Supp. _____, at _____), denying Curtis' motions under Rule 60(b), the trial judge gave the following as his views concerning Butts' status as a "public official":

"In the present motion at hand, the defendant contends that plaintiff's action comes under the *Times* ruling in that plaintiff was a public official, and that the verdict and judgment was awarded plaintiff as damages for injury to his reputation as a football coach on account of a publication made by the defendant concerning plaintiff's actions while acting as Director of Athletics at the University of Georgia. In the trial of the case, movant defended the action by entering a plea of justification, and no defense was made or evidence introduced concerning Butts' position as Athletic Director or as a public official. Georgia law provides under certain conditions communications concerning the acts of public men in their public capacity and reference therewith to be deemed privileged. Georgia Code Annotated, Section 105-107(6). Just where in the ranks of government employees the 'public official' designation extends, the Supreme Court in the *Times* case did not determine. The decision did determine that Sullivan, as an elected city commissioner of Montgomery, fitted into the category of public officials.

"Under Georgia law, members of the Board of Regents of the University System are public officials. Georgia Sessions Laws, 1931, Pages 7, 45. The evidence presented at the trial shows that plaintiff was Director of Athletics at the University for some two years prior to February, 1963, at which time he resigned. The article complained of was published in the defendant's issue of March 23, 1963. The Board of Regents at both the University of Georgia (located in Athens) and the Georgia School of Technology (located in

any right it may have had to challenge the verdict and judgment of any of the constitutional grounds asserted in *Times*.

Atlanta) control the athletic programs of the two institutions, but the details are handled at each institution by an athletic association composed of faculty members and alumni, and each is incorporated to facilitate such business transactions as improvement of athletic grounds and equipment at the two institutions. The schedule of athletic contests for each year is approved by the faculty and by the Regents. The separate athletic associations at both institutions are wholly under the control of the Regents and are their agents. For further details of the athletic setup, see *Page v. Regents of University System of Georgia*, 93 F. 2d 887, 891-892. As was stated in the *Page* case, the 'coaches' are also members of the faculty.

"Plaintiff Butts was Director of Athletics at the University. The Athletic Director, along with the various coaches in the Athletic Department, were employed by the separate incorporated athletic association. However, the defendant seeks by this motion to extend the category of 'public officials' to one employed as agent by the University of Georgia Athletic Department. Even if plaintiff was a professor or instructor at the University, and not an agent of a separate governmental corporation carrying on 'a business comparable in all essentials to those usually conducted by private owners' he would not be a public officer or official. Under Georgia law, the position of a teacher or instructor in a state or public educational institution is not that of a public officer or official, but he is merely an employee thereof. *Regents of the University System of Georgia v. Blanton*, 49 Ga. App. 602(4); *Board of Education of Doerun v. Bacon*, 22 Ga. App. 72. To hold plaintiff, an employee of the University Athletic Association, a public official would, in this court's opinion, be extending the 'public official' designation beyond that contemplated by the ruling in the case of *New York Times Company v. Sullivan*, supra."

See also: *Martin v. Smith*, 239 Wis. 314, 1 N. W. 2d 163, 140 ALR 1063.

The case of *Barr v. Matteo*, 360 U.S. 564, 3 L. ed. 2d 1434, 79 S. Ct. 1335 (1959), cited in the *Times* case, held that in the reciprocal situation where two government employees were suing the director of an important United States Government agency for his alleged libelous conduct, the director, a public official, has absolute privilege, regardless of the existence of malice, in defense of the alleged

[fol. 1634] The Arguments of Counsel

Curtis contends that the jury arguments of Butts' counsel constituted "significant and fundamental errors which the court may notice without objection".

libel, although his conduct was within the outer perimeter of his line of duty. The policy of this position is to aid in the effective functioning of government by assuring that government officials shall be free to exercise their duties without fear of damage suits with respect to acts done in the course of those duties.

In cases decided since the Times case, the "public official" designation has not been extended. The court, in the case of *Garrison v. Louisiana*, 379 U.S. 64, 13 L. ed. 2d 125, 85 S. Ct. 209 (Nov. 1964), in reversing the conviction of the New Orleans Parish District Attorney for the criminal defamation of eight judges of the Criminal District Court of the Parish of New Orleans, stated that "the rule protects . . . the free flow of information to the people concerning public officials, their servants . . .", whatever touches upon "an official's fitness for office is relevant A candidate must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office". Justice Goldberg, in his concurring opinion, stated that "libel on the official conduct of the governors (of the people) . . . can have no place in our Constitution."

The Second Circuit, in *Pauling v. News Syndicate Company, Inc.* (2nd Cir. 1964), 335 F. 2d 659, considered the possible extensions of the doctrine of the Times case, stating that a candidate for public office would seem an inevitable candidate for extension, and that once an extension is made, the participant in public debate on any issue of grave public concern would be next in line. Quoting the Times case, the court then said: "The profound issues should be uninhibited, robust, and wide-open, now applied to confer immunity on 'vehement, caustic, and sometimes unpleasant sharp attacks on government and public officials', may some day be found to demand still further erosion of the protection heretofore given by the law of defamation."

The *Henry v. Collins* and *Henry v. Pearson* cases, 380 U.S. 356 (1965), reversed a judgment for the plaintiffs on the ground that the lower court's charge to the jury on malice was error under the Times and Garrison cases, thus indicating that a County Attorney and a Chief of Police would come within the privilege. Justices Black, Douglas and Goldberg concurred, not due to the error in the charge, but on the ground that such a suit would violate the First and Fourteenth Amendments under the Times case, where the

The record reflects that Curtis was represented at the trial by several attorneys. One argument for each side was made on Friday and the remaining arguments were completed the following Monday. Much of the argument of which complaint is now made was offered on Friday. Yet, no objection to any portion of the arguments was raised until Curtis filed its motion for new trial nine days after the jury verdict was returned.

[fol.1635] The trial court correctly disposed of this matter in the following language:

"It is an elementary principle of federal law that a new trial will not be granted where a party seeks to raise for the first time, on a motion for a new trial, (the objection) that opposing counsel was guilty of misconduct in his argument to the jury, where such conduct was not excepted to during the trial."²⁴

If, as Curtis' counsel now claim, the arguments were, among other things, "grossly improper and inflammatory", "intemperate and inexcusable", "appeals to passion and prejudice", "corruptions of the evidence", "completely unsupported by the evidence", and "unsworn testimony of counsel", it is inconceivable to us that they would have delayed so long without raising the slightest hint of an

defendant published his criticism of the plaintiffs' performance of their public duties.

This court in *Buckley v. The New York Times* (5 Cir. 1964), 338 F. 2d 470, after deciding the case on procedural grounds, stated in dicta that "a judicial determination by this court of the proposition that the principles of (the Times case) should be extended to candidates for public office, must await an appropriate case."

For other cases decided by district courts, see: *Smoot v. League of Women Voters of the Grand Traverse Area* (W. D. Mich. 1964), 36 F.R.D. 4; and *H. O. Merren & Co., Ltd. v. A. H. Belo Corp.* (N.D. Tex. 1964), 228 F. Supp. 515.

²⁴ *Supra* note 6, at 922.

See also: *Fidelity & Casualty Co. of N.Y. v. Williams* (5th Cir. 1952), 198 F. 2d 128.

objection. Leeway must often be allowed counsel in objecting to argument lest the objection itself magnify the harm. But to say nothing during argument, the extended week-end recess, and for nine days thereafter, leaves us with the conviction that they did not consider the arguments objectionable at the time they were delivered, but made their claim as an afterthought.

Furthermore, after carefully considering the entire record, we do not consider that the arguments belatedly objected to would have required a reversal, even if timely objections had been made. Some of the argument was in-[fol. 1636] vited, but the very nature of the case made it virtually impossible to discuss the evidence free of emotion or drama. The editor-in-chief of the Post set the tone and the stage for the attack. He openly boasted that the Post's new policy of "sophisticated muckraking" was the "final yardstick" of editorial achievement since it meant "we are hitting them where it hurts." It was no wonder that the author Graham was equally callous in admitting that he knew that "when this article was published that was the death of Wally Butts in his chosen profession" and that "Curtis Publishing Company knew that when that article was published it would ruin Coach Butts' career." The policy of the magazine so bluntly stated²⁵ was by itself

²⁵ In the deposition of Clay D. Blair, Jr., editor-in-chief, it was developed that for the first quarter of 1963, Curtis showed a loss of about \$1.1 million, compared to a loss in 1962 for the same quarter of \$4.7 million; that in 1960 the amount of advertising revenue was \$106 million; that in 1961 the figure had dropped to \$86 million; that Blair was made a vice-president of Curtis in June of 1962; that circulation is one of the factors that affects advertising revenues; that demography is important, because "all circulation in Russia would not be appealing to General Motors;" that Blair wrote a memo to his staff, which found its way to a national magazine, in which he was quoted as saying: "The final yardstick is the fact that we have about six lawsuits pending, meaning that we are hitting them where it hurts, with solid, meaningful journalism"; that he was not being facetious when he used the phrase "sophisticated muckraking"; that he meant it when he said it and when he testified; that he was correctly quoted as being

[fol. 1637] more than enough to inflame the jury. Counsel for Butts could only gild the lily.²⁸

The Exclusion of Testimony

Butts was asked by Curtis' counsel on cross-examination if he recalled having made a statement over television, on a date prior to the institution of this action, that he "would never at any time and never . . . (had) done anything that would injure the University of Georgia". He responded that he had made a statement to that effect, but that "as far as my services at the University of Georgia are concerned that represents only my opinion". Proffered evi-

"concerned with the image of the Post and in trying to get a new image, portray a different type of magazine"; that he did change the image of the Post; that the Butts issue was representative of the new type magazine Curtis was interested in publishing; that "we have perhaps come . . . 25 per cent of the way with this issue . . . toward the goal of the magazine that I envision"; that this issue is a step in the right direction; that he was acquainted with the term "muckraking" prior to using it in the interview which led to an article in Newsweek on November 19, 1962; that in the interview with Newsweek he stated that he intended to "restore the crusading spirit . . . the sophisticated muckraking, the expose in the mass magazines . . . to provoke people, make them mad"; that he further stated in the interview: "But careers will be ruined, that is sure", and he could not quarrel with the fact that Butts' career was one of the careers to which reference was made in that statement.

²⁸ The trial court also pointed out that Butts was unquestionably one of the leading figures in the national football picture; that responsible officials of the Post knew that after the article was published Butts' career would be ruined; that Butts, through his attorney, had notified Curtis before publication that the article was false; that one of Butts' daughters had telephoned long distance to a Post official with a plea that the article be withheld from publication; and that after publication Butts had, pursuant to Georgia law, requested a retraction from Curtis, which was refused. The court then commented that the jury was warranted in concluding from all the facts in the case, including "the persistent and continuing attitude of the officers and agents of the defendant that there was a wanton or reckless indifference of plaintiff's rights." *Supra* note 6 at 919.

dence which Curtis asserts "is replete with incidences of Butts' unfaithfulness and disloyalty to the University of Georgia", was excluded by the trial court. Curtis insists, however, that the evidence should have been admitted, not only to demonstrate Butts' true character, but to impeach his credibility as a witness.

[fol. 1638] We are in agreement with the trial court that proof of Butts' character could be made by reputation only, and that particular acts of misconduct are irrelevant.²⁷

The rule that "a party may be cross-examined to bring out matters, even though they may be collateral, which are inconsistent with the testimony given by him",²⁸ is not applicable here. The answer given by Butts to the question asked by Curtis' counsel concerning a statement previously made out of court, was not such an affirmative profession of faithfulness and loyalty to the University of Georgia, made at the trial, as would open the door, for the purpose of impeachment, in mitigation of damages, or otherwise, to the admission of alleged incidents of "unfaithfulness and disloyalty" to that institution, either by cross-examination of Butts, or by direct evidence from other witnesses.

Complaint is made that Curtis was not permitted to show that Butts had refused to answer certain questions in his deposition, and that evidence offered as to purportedly false testimony given by Butts in his deposition was rejected. Butts' refusal to answer was on advice of counsel. The answers sought were subsequently supplied, but Curtis argues that because of the delay it was denied adequate discovery and thereby "lost valuable time in the preparation of its case".

²⁷ Note 6, *supra*, at 921.

²⁸ 98 C.J.S. Witnesses, § 399; 3 Wigmore, Evidence (3d ed. 1940), § 1006(2).

The trial judge was clothed with broad discretion in controlling the extent of direct and cross-examination,²⁹ and [fol.1639] we cannot say that he abused that discretion in excluding the proffered evidence.

Similarly, we do not think the trial court abused his discretion in refusing to admit evidence that the witness Carmichael, while a minor in Ohio, had been convicted of petty larceny in 1933. The ruling was based upon lapse of time.³⁰

Curtis sought to introduce into evidence certain extrajudicial statements made by George Burnett, and statements made to him by third parties. These included inquiries made by Burnett of the telephone operator and her replies thereto,³¹ a telephone conversation between Burnett and one Milton Flack, purportedly made immediately after Burnett had overheard a telephone conversation between Butts and Bryant,³² Burnett's conversation with one Bob Edwards about the notes he had

²⁹ See *Roberson v. United States* (5 Cir. 1957), 249 F. 2d 737; *Carpenter v. United States* (4 Cir. 1959), 264 F. 2d 565; *Poliafico v. United States* (6 Cir. 1956), 237 F. 2d 97.

³⁰ *Supra* note 6, at 921.

³¹ Curtis says this was offered only to show that a telephone conversation between Butts and Bryant had actually taken place. Butts, however, contends no such limitation was placed on this testimony.

³² Burnett testified that he had been trying to contact Milton Flack by telephone when he intercepted the alleged call between Butts and Bryant, after which he says he hung up the phone and sat for about twenty or thirty seconds before picking up the phone and again calling Flack's number. Curtis wanted to prove that Burnett asked Flack: "Is Wally Butts in your office now Milt", to which Flack is supposed to have replied that Butts was at that time in his office making a telephone call. The court allowed Burnett to state that he called Flack, but excluded as hearsay anything he might have said to Flack.

taken;³³ Burnett's statements at meetings with officials of [fol. 1640] the University of Georgia; and statements of these university officials made in checking Burnett's story at meetings with him.³⁴ All of these incidents had been reported in the article.

It was, of course, important from Curtis' standpoint that it show its good faith in publishing the article. The proffered evidence would have tended to show that these statements as set forth in the article had, in fact, been made, and we think the trial court should have admitted it for that limited purpose only. However, the full import of most, if not all, of that evidence got before the jury in some form before the trial was concluded.

In any event, none of the testimony involved related to the real "sting of the libel", and we do not consider that substantial error was committed in its exclusion. Curtis had the burden to show more than nominal error to secure reversal for rulings of evidence,³⁵ and this it has failed to do.

The Jury Instructions

Complaint is made that the trial court committed plain and prejudicial error in instructing the jury. No objections

³³ Bob Edwards was division manager of the company with which Burnett was connected. Burnett testified that he had a conversation with Edwards on January 4, 1963 about the notes he had taken on September 13, 1962. The court sustained an objection to the conversation itself on the ground that it was hearsay. On cross-examination, Burnett testified that he did not have his notes with him when he first talked with Edwards on January 4, 1963, but did show them to Edwards some two weeks later.

³⁴ Curtis contends that the investigation conducted by the officials of the University of Georgia would support Burnett's credibility, because it demonstrated his willingness to cooperate, and to have his story questioned.

³⁵ Rule 61, F.R.Civ.P.; *Jennings v. United States* (5 Cir. 1934), 73 F. 2d 470, 471.

[fol. 1641] to any instructions were made at the trial of the case.³⁶ Rule 51, F.R.Civ.P., provides in part that:

"No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objections out of the hearing of the jury."

Full opportunity was afforded counsel for Curtis to make any objections before the jury was permitted to consider its verdict. Under Rule 61, F.R.Civ.P., all errors which could not change the result of the trial, or which did not affect the substantial rights of the parties, are harmless and must be disregarded. No action taken by the court with respect to any instruction now under attack appears inconsistent with substantial justice, or to have affected the substantial rights of the parties, and we agree with the trial court that Curtis may not now complain.³⁷

The Refusal to Give Requested Instructions

There is no merit to Curtis' contention that the trial court erred either in refusing to charge the jury that it should construe Butts' testimony most strongly against him, or in refusing to charge the jury that it should disregard the entire testimony of any witness whom it found to have knowingly and wilfully testified falsely.

[fol. 1642] The court's charge fully covered the general rules relating to the credibility of witnesses. The question concerning the credibility of any witness, and whether or not he had been successfully impeached, was left entirely to the jury. There was no showing that any witness had knowingly and wilfully testified falsely, and the evidence

³⁶ The claim that certain of the jury instructions violated constitutional rights of Curtis is dealt with in this opinion under the heading "Curtis' Constitutional Rights". See notes 15-23, *supra*.

³⁷ *Supra* note 6, at 922.

was more than adequate to support the verdict, even if the jury had completely disregarded the alleged equivocal testimony of Butts.

The "Newly Discovered Evidence"

In its motion for new trial under Rule 60(b) (2), F.R. Civ.P., Curtis contended that new evidence discovered since the trial conclusively demonstrates the falsity of the testimony of two of Butts' witnesses, Dr. Frank A. Rose and Coach Paul "Bear" Bryant, and strongly supports the defense of justification.

The trial court rejected this contention because (1) Curtis had not exercised reasonable diligence, (2) the evidence would merely tend to affect the weight and credibility of the testimony of Dr. Rose, and (3) the evidence would not have changed the verdict in this case.³⁸

We are in accord with the trial court's conclusions, and do not find that he has abused his discretion.

[fol. 1643]

Punitive Damages

The trial judge gave his reasons for requiring the remittitur of all punitive damages in excess of \$400,000.³⁹ There is not the slightest suggestion that he thought, or even intimated, that the larger award was based on passion or prejudice. On the contrary, fully aware of the distinction between a verdict excessive in amount which may be reduced by remittitur, and one resulting from improper influences such as passion and prejudice which may not be corrected in this way, the judge necessarily rejected the idea that this verdict had been infected by such destructive elements.

The Georgia Code expressly provides for punitive damages.⁴⁰ Under Georgia law, three things are left for the

³⁸ In his opinion dated April 7, 1964 the trial court fully discussed this matter. (See *supra* note 23, at 16.)

³⁹ *Supra* note 6, at 919.

⁴⁰ Ga. Code Ann. § 105-2002: "In every tort there may be aggravating circumstances, either in the act or the intention, and

jury to determine: (1) "when punitive damages shall be allowed"; (2) "the amount of such damages"; and (3) the purpose of the award as "either to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff."⁴¹ Obviously there are, and can be, no precise standards for these determinations. Not for the first time in the common law tradition, the law turns to the jury. And Georgia prescribes that "(t)he [fol. 1644] measure of . . . punitive damages . . . is to be fixed by the enlightened conscience of an impartial jury."⁴² What the "enlightened conscience" of one impartial jury might consider to be fair may not satisfy another impartial jury with an equally enlightened conscience. A wide variance in the amounts of such awards is inescapably inherent in any submission of the issue of punitive damages.

But, of course, no one would suppose that it is left wholly and solely to the jury. As with every other issue traditionally for jury resolution, the trial judge must still determine whether, as a matter of law, the verdict comports with law. The law recognizes that an award of any type of damages—compensatory or punitive—made by a jury free of bias, may be too small or too large. When that occurs—when the judge concludes that the law regards the verdict as too small or too large—then appropriate action must be taken by the court. Reviewing the amount of the verdict and reaching the conclusion that it is more than the law would permit is not, therefore, the equivalent of the judge's determination that excessiveness is due to a runaway jury, under the spell of passion or bias.

in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff." Also see *National Association for the Advancement of Colored People v. Overstreet*, Ga. _____, S.E. 2d _____ (No. 22814, April 20, 1965, as modified May 7, 1965). See Division 4, subd. (b) of opinion.

⁴¹ *National Association for the Advancement of Colored People v. Overstreet*, supra, note 40.

⁴² *Id.*

The trial judge had the duty of determining whether as a matter of law (a) any allowance for punitive damages could be made, and (b) what the maximum would be. As to (a), the trial court not only expressed the opinion that the article was extremely defamatory, and that the jury had no choice other than to find Curtis liable, but he also thought that there was "ample evidence from which a jury could have concluded that there was reckless disregard by [fol. 1645] defendant of whether the article was false or not."⁴³ Upon determining (b) he had then to decide whether to grant a new trial or require a remittitur as to the excess.⁴⁴ The latter is a permissible course and does

⁴³ The trial court said, in its April 7, 1964 opinion (see *supra* note 23, at 16), that:

"If it were conceded that plaintiff Butts was a 'public official', the case of *New York Times Company v. Sullivan* would not permit the vacating of this court's previous judgment, as the ruling in the *Times* case does not prohibit a public official from recovering for a defamatory falsehood where he proves 'actual malice'—that is, with knowledge that it was false or with *reckless disregard of whether it was false or not*. (Italics supplied.) In the trial of this case, there was ample evidence from which a jury could have concluded that there was reckless disregard by defendant of whether the article was false or not. See the court's ruling on defendant's motion for a new trial dated January 14, 1964. *Butts v. Curtis Publishing Company*, 225 F. Supp. 916."

⁴⁴ *State Farm Mutual Automobile Insurance Company v. Scott* (5 Cir. 1952), 198 F. 2d 152.

Curtis cites *Crowell-Collier Publishing Company v. Caldwell* (5th Cir. 1948), 170 F. 2d 941, where this Court held that the refusal to set aside a libel verdict of \$237,500 was an abuse of discretion. Judge Hutcheson found that "litigants, witnesses, lawyers and jury seemed to regard the contest as a sporting event, a wager by battle, in which the best battler ought to and would win"; that the trial judge "held himself a little too aloof from the trial . . . , with the result that the trial got out of hand;" and that "when counsel for defendant made vigorous objections to the argument as highly improper, inflammatory, and prejudicial, and requested the court to instruct the jury to disregard them, the court said merely: 'Objection overruled. Request denied. Exception noted' ". Obviously, the same circumstances were not present

not infringe upon the Seventh Amendment's guaranty of a jury trial.⁴⁵ In making his determination as to (b), he [fol. 1646] pursued the correct standard of keeping the verdict "within reasonable bounds considering the purpose to be achieved as well as the corporate defendant's wanton or reckless indifference to the plaintiff's rights."⁴⁶ Obviously, in deciding the matter the judge had to pick a dollar figure beyond which the law would not go. He selected the sum of \$400,000 as the maximum which the law would accept to deter Curtis from repeating the trespass or to compensate the wounded feelings of Butts.⁴⁷ Although the reduction required, and the sum remaining, were each substantial, there was ample basis for the trial court's judgment.

To have granted a new trial might appear to have been an easier way out. But that is really no solution. On a retrial, the judge could not instruct the next jury as to the dollar maximum of any such verdict. So that jury would

in the instant case, where the judge was in complete control, the trial was conducted in an orderly, efficient and proper manner, and no objections whatever were made to the conduct of the trial, or to the arguments of counsel.

⁴⁵ *Arkansas Valley Land & Cattle Co. v. Mann*, 1889, 130 U.S. 69, 9 S.Ct. 458, 32 L. ed. 854; *International Paper Co. v. Busby* (5 Cir. 1950), 182 F. 2d 790; *United States v. Certain Parcels of Land in Rapides Parish, La.* (5 Cir. 1945), 149 F. 2d 81, 83.

⁴⁶ *Supra* note 6, at 920.

⁴⁷ *Supra* note 6, at 919. Butts, in arguing that the district court was far more lenient to Curtis in reducing the award than was justified, said: "The jury in the case at bar recognized that a 100 million dollar corporation with a circulation of between six and seven million copies and a readership of approximately 22,000,000 persons can be deterred by no less than three million dollars as a charge for its misuse of a cherished American freedom—the freedom of every man to live unthreatened by calumny. This jury believed that anything less than this amount would merely add to the audacious course of 'sophisticated muckracking' upon which the Curtis Publishing Company has admittedly set its sights." See also note 26, *supra*.

be pretty much on its own, under the unavoidably vague, elastic standards prescribed in the Code, as measured by the enlightened conscience of an impartial jury."⁴⁸ The trial judge, on the second trial, would then be forced to repeat the process of testing for (a) and (b). If, as urged [fol. 1647] by Curtis, the determination by the judge that the amount is too much, necessarily means a new trial, it is quite possible that the case would never end. Georgia has prescribed the "punishment" for aggravated willful torts. "The law ought not to frustrate the vindication of that policy by an unrealistic procedure. The jury verdict, as reviewed and reduced by the trial judge, is the tortfeasor's assurance that such damages will not exceed that which the law would tolerate to achieve the Georgia objective of deterring repetition or compensating wounded feelings.

Conclusion

This is no ordinary libel case. The publication of the article by the Post, in the face of several specific appeals that it refrain from doing so, was part and parcel of a general policy of callousness, which recognized from the start that Butts' career would be ruined. The trial judge's appraisal of the evidence, with which we are in complete accord, was that it was sufficiently strong to justify the jury in concluding that what the Post did was done with reckless disregard of whether the article was false or not.

The case was fully developed during extensive pre-trials, and in a jury trial lasting two weeks. The record itself comprises 1613 pages. We have given full consideration to the entire record, as well as to the more than 650 pages of briefs submitted by both parties,⁴⁹ the numerous authorities cited therein, and the oral arguments of counsel. We think that Curtis has had its day in court. It apparently thought so too until the jury verdict was returned. This is attested by the fact that practically all of its present complaints were not even raised until after the trial.

⁴⁸ See notes 40 and 41, *supra*.

[fol. 1648]. Believing and so finding that the trial was fair, and that the judgment of the trial court was correct and proper in all respects, it is Affirmed.

In view of our holding, we have given no consideration to Butts' cross appeal.

RIVES, Circuit Judge, dissenting:

Wallace Butts, former Athletic Director of the University of Georgia, instituted this diversity action in the district court against the Curtis Publishing Company, publishers of *The Saturday Evening Post*. The complaint demanded \$5,000,000 general and \$5,000,000 punitive damages for an alleged libel contained in an article entitled, "The Story of a College Football Fix," which was published in the March 23, 1963, issue of the *Post*. The action resulted in a jury verdict against the defendant for \$60,000 general damages and \$3,000,000 punitive damages. The district court granted the defendant's motion for a new trial, conditioned upon the failure of the plaintiff to remit that portion of the award of punitive damages in excess of \$400,000. The district court was of the opinion that the award of \$60,000 for actual damages was not excessive, but the court concluded that the award for punitive damages was "grossly excessive." Pursuant to the district court's order, the plaintiff filed a remittitur and thereafter the district court overruled the defendant's motion for a new trial and entered judgment for the plaintiff in the amount of \$460,000. Approximately six weeks after the district court entered judgment, the Supreme Court decided *New York Times Co. v. Sullivan*,¹ and the defendant filed its motion for new trial under Rule 60(b) of the Federal Rules of Civil Procedure. The defendant contended that the previous judgment should be vacated and a new trial ordered in light of the *New York Times Co.* case. The district court denied the motion.

¹ 376 U.S. 254 (1964). See, generally, Berney, Libel and the First Amendment—A New Constitutional Privilege, 51 Va.L.Rev. 1 (1965).

It is my view that the district court erred in not granting a new trial in light of *New York Times Co.* If mistaken in that view, I am nonetheless convinced that the part of the judgment awarding \$400,000 in punitive damages cannot stand in the light of the first, fifth and seventh amendments to the Constitution.

First, however, let me say that this record makes clear beyond controversy that the questions of fact are for the jury's determination. The district court denied the plaintiff's motion for a directed verdict. Plaintiff's counsel insisted and the following colloquy ensued:

"Mr. Lockerman: —on the point that the defendant had not, under the evidence that it has shown, proven the truth under the burden that it had of the things that it has said against the plaintiff in this article.

"The Court: Mr. Lockerman, I think it would [be] in error for this Court to withdraw that issue from the Jury."

[fol. 1650] In ruling on the motion for a new trial, however, the district court commented: "The guilt of the defendant was so clearly established by the evidence in the case so as to have left the jury no choice but to find the defendant liable." The majority opinion quotes that comment and adds its "Amen" thus: "We heartedly agree with that appraisal." I do not think that any such appraisal should be made. Even a casual reading of the record demonstrates that the questions of fact should be left to the jury.

I. *Sullivan v. New York Times Co.* necessitates reversal of the judgment in toto.

The Supreme Court in *New York Times Co. v. Sullivan* held that the Constitution limits state power, in a civil action brought by a public official for criticism of his official conduct, to an award of damages for a false statement made with "actual malice," that is with knowledge that it was false or with reckless disregard of whether it

was false or not.² The district court did not think the *New York Times Co.* case governed the present action for the reason that the present plaintiff was not a "public official" as contemplated by the *New York Times* rule, and for the reason that ample evidence existed from which a jury could have concluded that there was reckless disregard by the defendant of whether the article was false or not. [R., pp. 1467-68.] The district court stated that "to hold plaintiff, an employee of the University Athletic Association, a public official would, in this Court's opinion, be extending the 'public official' designation beyond that contemplated by the ruling in the case of *New York Times* [fol. 1651] *Company v. Sullivan*. . . ." [R., p. 1467.] The plaintiff held to be a "public official" in *New York Times Co.* was Commissioner of Public Affairs, one of three elected Commissioners of the City of Montgomery, Alabama. His duties involved the supervision of the Police Department, Fire Department, Department of Cemetery and Department of Scales.³ The Supreme Court noted:

"We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. Cf. *Barr v. Matteo*, 360 U.S. 564, 573-575. Nor need we here determine the boundaries of the 'official conduct' concept. It is enough for the present case that respondent's position as an elected city commissioner clearly made him a public official, and that the allegations in the advertisement concerned what was allegedly his official conduct as Commissioner in charge of the Police Department."⁴

² 376 U.S. 254, 279-80 (1964); *Garrison v. Louisiana*, 379 U.S. 64, 67 (1964).

³ See *New York Times Co. v. Sullivan*, 1964, 376 U.S. 254, 256.

⁴ *Id.* at 283, n. 23.

It is clear that "public officials" as contemplated by *New York Times Co.* are not limited to elected officials. In *Garrison v. Louisiana*,⁵ decided subsequent to *New York Times Co.*, the District Attorney for Orleans Parish, Louisiana, was convicted of criminal libel for issuing a statement disparaging the judicial conduct of the eight judges of the Criminal District Court. The Supreme [fol. 1652] Court's decision, which brought the District Attorney's statement within the purview of criticism of the official conduct of "public officials" and entitled to the benefit of the *New York Times Co.* rule, did not hinge on whether the eight judges were elected officials. No mention was made of how the judges obtained their positions. Moreover, it is clear from the Court's statement in *New York Times Co.*, quoted above, that the rule applies to "government employees." The question reserved by the Court was "how far down into the lower ranks of government employees the 'public official' designation would extend" A precise formula for designation of "public officials" for the purpose of the *New York Times* rule was not attempted. Indeed, it is clear from the background and reasons for the rule that to fashion and apply a precise formula for designation of "public officials" for the purpose of the *New York Times* rule would be a formidable, if not impossible, task.⁷

The first amendment secures freedom of expression upon public questions. The constitutional safeguard, the Supreme Court has said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."⁸ Similarly, "[I]t is

⁵ 379 U.S. 64 (1964).

⁶ *New York Times Co. v. Sullivan*, 376 U.S. 254, 283, n. 23 (emphasis supplied).

⁷ Cf. *Burton v. Wilmington Parking Authority*, 1961, 365 U.S. 715, 722 (state responsibility under the Equal Protection Clause).

⁸ *Roth v. United States*, 1957, 354 U.S. 476, 484.

a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions." Mr. Justice Brandeis has stated that "those who [fol. 1653] won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government."¹⁰ *New York Times Co. v. Sullivan*, 1964, 376 U.S. 254, 269-70. As was said in *Garrison v. Louisiana*,¹¹ the First and Fourteenth Amendments embody our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' *New York Times Co. v. Sullivan* . . . " It was against this background that the Supreme Court in *New York Times Co.* stated that the newspaper advertisement, which contained an inaccurate description of events occurring in Montgomery in connection with the civil rights movement, was an expression of grievance and protest on one of the major public issues of our time and would seem clearly to qualify for the constitutional protection.¹²

It is therefore necessary to examine the facts and weigh the circumstances to determine whether the allegedly defamed plaintiff is involved in the "conduct of the public business"¹³ to an extent which attains constitutional significance.

The plaintiff held his position of Athletic Director of The University of Georgia by reason of a contract with the Board of Regents of the University System of Georgia, which hired him as an employee. [Brief for Appellee, p.

⁹ *Bridges v. California*, 1941, 314 U.S. 252, 270.

¹⁰ *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (concurring opinion).

¹¹ 379 U.S. 64, 75 (1964).

¹² See 376 U.S. at 271.

¹³ *Garrison v. Louisiana*, 1964, 379 U.S. 64, 73.

[fol. 1654] 67.] The plaintiff supervised the scheduling and location of games, planned and budget, attended to the addition of new athletic facilities, supervised ticket sales and prepared plans for band trips and performances. Moreover, he generally supervised "the entire athletic program of the school." [R., pp. 654-55; Brief for Appellee, pp. 69-70.] The education of youth in the State of Georgia is unquestionably a matter of public concern. By his position the plaintiff is intricately involved with a significant public issue, that is, the education of the youth who attend The University of Georgia—a public institution. According to the Duke of Wellington, "The battle of Waterloo was won on the playing fields of Eton." The ever-increasing difficulties to be faced by this nation require the utmost integrity in the training of its youth. I think the plaintiff is a "public official" as contemplated by the *New York Times Co.* decision.

The article, which the defendant published under the subtitle, "How Wally Butts and Bear Bryant Rigged a Game Last Fall," concerned alleged information on Georgia plays given by Wallace Butts to Coach Paul Bryant relating to the University of Alabama and the University of Georgia football game played in Birmingham in September 1962. The article charged Wallace Butts with being corrupt and with betraying his players. It charged that the players were forced into the game like "rats in a maze" and "took a frightful physical beating." In an italicized preface to the article, "The Editors" stated that Wallace Butts and Coach Bryant were participants in the greatest and most shocking sports scandal since that of the Chicago White Sox in the 1919 World Series. In the same preface, [fol. 1655] Wallace Butts was relegated to a status worse than that of "disreputable gamblers" and a corrupt person who, employed to "educate and guide young men," betrays or sells out his pupils. [See R., pp. 88-89 (order granting motion for new trial.)]

I think it clear that the defendant's statements are within the purview of criticism of the official conduct of

public officials. As stated by the Supreme Court, "the public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character."¹⁴

The district court charged the jury that general damages were recoverable absent proof of actual malice. The plaintiff argues that even if the *New York Times* rule is applicable, the district court's failure to charge that malice is a prerequisite for actual damages is harmless error since the district court charged that actual malice was required for an award of punitive damages and the jury awarded punitive damages. I do not agree that the district court's charge complies with the *New York Times* rule.

In dealing with the question of punitive damages, the district court charged the jury:

"Where it is established that the defendant was inspired by actual malice in the publication of the defamatory matter, the jury, in its discretion, may, but [fol. 1656] is not required, to award punitive damages. As previously stated to you, actual malice encompasses the notion of ill will, spite, hatred and an *intent to injure one*. Malice also denotes a wanton or reckless indifference or *culpable negligence with regard to the rights of others*." [R., p. 1356] (Emphasis supplied.)

I think it clear that the district court's charge does not embrace the *New York Times Co.* definition of actual malice, which is with knowledge that *the statement* was false or with reckless disregard of whether it was false or not. The *New York Times* rule emphasizes "the knowingly false

¹⁴ *Garrison v. Louisiana*, 1964, 379 U.S. 64, 76-77.

statement and the false statement made with reckless disregard of the truth,"¹⁵ and not merely intent to injure the individual or negligent disregard of the rights of others. The necessary requisite to a showing of actual malice under the *New York Times* standard is proof that "the lie . . . [is] knowingly and deliberately published about a public official" or published "with reckless disregard of the truth."¹⁶

Since the jury might well have understood the district court's charge to allow recovery on a showing of intent to inflict harm or even the culpably negligent infliction of harm, rather than intent to inflict harm through falsehood, the charge does not comply with the *New York Times* standard.¹⁷

The majority of this Court have held that the defendant "has clearly waived any right it may have had to challenge [fol. 1657] the verdict and judgment on any of the constitutional grounds asserted in *Times*." While I respect the judgment of the majority, I do not share that judgment.¹⁸ In short, I do not think the defendant may be said to have waived by "silence" a constitutional right not enunciated at the time; it was not even enunciated by the counsel who petitioned for certiorari in the *New York Times Co.* decision.

In the *New York Times Co.* case, the trial judge charged that the portions of the advertisement in issue were "libelous *per se*," that "general damages need not be alleged or proved but are presumed," that the plaintiff was entitled to recover both such "presumed" and punitive

¹⁵ *Id.* at 75 (emphasis supplied).

¹⁶ *Ibid.*

¹⁷ *Henry v. Collins*, 1965, 380 U.S. 356; see *Garrison v. Louisiana*, 1964, 379 U.S. 64, 73.

¹⁸ It seems to me that to constitute such a waiver there must have been "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 1938, 304 U.S. 458, 464; *Fay v. Noia*, 1963, 372 U.S. 391, 439.

damages if the jury decided that the words related to and concerned him and that the damages awarded were not excessive. The jury awarded damages of \$500,000. The questions presented to the Supreme Court in the petition for a writ of certiorari dealt with the award of \$500,000, the sufficiency of the evidence and the lack of proof of special damages in light of the first amendment as embodied in the fourteenth.¹⁹ Conspicuously absent is any suggestion [fol.1658] that the first amendment, as embodied in the fourteenth amendment, requires that a public official must prove actual malice against critics of his official conduct.²⁰

¹⁹ In detail, the questions presented were:

"1. Whether, consistently with the guarantee of freedom of the press in the First Amendment as embodied in the Fourteenth, a state may hold libelous *per se* and actionable by an elected City Commissioner, without proof of special damage, statements critical of the conduct of a department of the City Government under his jurisdiction which are inaccurate in some particulars.

"2. Whether there was sufficient evidence to justify, consistently with the guarantee of freedom of the press, the determination that statements, naming no individual but critical of the Police Department under the jurisdiction of the respondent as an elected City Commissioner, were defamatory as to him and punishable as libelous *per se*.

"3. Whether an award of \$500,000 as 'presumed' and punitive damages for libel constituted, in the circumstances of this case, an abridgement of the freedom of the press."

Petition for Writ of Certiorari, p. 2, New York Times Co. v. Sullivan, 1964, 376 U.S. 254.

²⁰ In three of the 105 pages of their petition for certiorari, counsel dealt with "the doctrine espoused by the court below . . . that a public official is entitled to recover 'presumed' and punitive damages for a publication critical of the official conduct of a governmental agency under his general supervision, if that publication tends to 'injure' him 'in his reputation' or to 'bring' him 'into public contempt' as an official—unless a jury is persuaded that it is entirely true." Except for the statement of the case and facts, malice was mentioned in one sentence. See Petition for a Writ of Certiorari to the Supreme Court of Alabama, p. 13, New York Times Co. v. Sullivan.

Apparently this is due to the fact that the defendant's objections in the trial court were directed to the absence of a requirement of proof of special damages.²¹ Only by looking at the *New York Times Co.* case in retrospect can it be said that the defendant has waived the great constitutional rights contemplated by the *New York Times* rule. But applying the same "retrospective look" to the present case,²² it is also clear that had the defendant contended the same as did the defendant in the *New York Times* case, i.e., that the first and fourteenth amendments were "infringed by holding the publication libelous and actionable without proof of special damage,"²³ it would not have affected the trial of the present action; for the district [fol. 1659] court ruled, in dealing with the motion for new trial, that the *New York Times* rule was not applicable to the present plaintiff. [R., p. 1467.]

The fact that the present defendant offered no defense under Georgia law, which provides that communications concerning the "acts of public men in their public capacity" are deemed privileged under certain conditions, cannot be said to constitute a waiver of a defense that the plaintiff is a "public official" under the *New York Times* standard. As recognized by the plaintiff, members of the athletic department are, like members of the faculty, "employees" under Georgia law and are not considered in "public office" or "officers."²⁴ Thus, although the Georgia statute which grants a privilege to "comments upon the acts of public men in their public capacity and with reference thereto"²⁵ appears as broad, if not broader, than the "public official" as contemplated by *New York Times Co.*,

²¹ See Petition for a Writ of Certiorari to the Supreme Court of Alabama, p. 8, *New York Times Co. v. Sullivan*.

²² In football jargon, "by being Monday morning quarterbacks."

²³ *Ibid.*

²⁴ Brief for Appellee, pp. 67-69.

²⁵ Ga. Code Ann., § 105-709(6).

the plaintiff recognizes that the Georgia case law results in a narrow application of the privilege and the present plaintiff is not covered.

Moreover, I think that *Henry v. Collins*,²⁶ reflects that the Supreme Court does not intend to allow the great constitutional rights inherent in the *New York Times* rule to be ignored in a case such as the present one.

In *Henry v. Collins*, the most recent Supreme Court decision interpreting the *New York Times* rule, the Court reversed per curiam the judgments obtained by a county [fol. 1660] attorney and a chief of police in their libel actions against the petitioner. The petitioner had charged that his arrest for disturbing the peace was the result of "a diabolical plot." The trial judge had charged "that malice does not necessarily mean hatred or ill will, but that malice may consist merely of culpable recklessness or a wilful and wanton disregard of the rights and interests of the person defamed." The Supreme Court reversed since the trial judge's instructions concerning malice did not comply with the *New York Times* rule. The trial of the plaintiff's suit and the decision of the Mississippi Supreme Court affirming the judgments occurred shortly before the Supreme Court handed down *New York Times Co.* Like the present defendant, the defendant in *Henry* raised his first amendment question by a motion for a new trial. However, the defendant in *Henry* filed a motion for a directed verdict at the same time which also raised the first amendment question. Both motions were overruled. Significant is the fact that the constitutional questions raised by the motions were raised for the first time after the close of the plaintiffs' case.²⁷

²⁶ 1965, 380 U.S. 356.

²⁷ See Petition for Writ of Certiorari to the Supreme Court of Mississippi, *Henry v. Pearson*, p. 6. *Henry v. Pearson* and *Henry v. Collins* were decided together. See *Henry v. Collins*, 1965, 380 U.S. 356.

Since the majority of this Court are not of the opinion that the judgment must be reversed, considerations of effective judicial administration do not require me to review the evidence in the present record to determine whether it could constitutionally support a judgment for the plaintiff should the plaintiff seek a new trial.²⁸

[fol. 1661] In summary, I think the present diversity action was brought by a public official for criticism of his official conduct; therefore, he was limited to an award of damages for a false statement made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. The present action was tried on a definitely stated theory which was fundamentally and constitutionally deficient. The present action should be tried on the theory set forth by the Supreme Court's decision supervening the district court's judgment, that is, *New York Times Co. v. Sullivan*. In such a situation, it has been held, as far back as 1937, that the duty of the district court is to grant the motion for a new trial.²⁹

II. That part of the Judgment awarding \$400,000 punitive damages violates the defendant's rights under the first, fifth and seventh amendments.

On the question so far discussed, that is, whether *New York Times v. Sullivan* necessitates reversal of the judgment in toto, I would concede that there is a debatable issue of waiver on which I differ from the majority. The questions hereafter discussed had their genesis in the jury's verdict and are unquestionably preserved for review by the defendant's first motion for new trial (R., pp. 46-48).

²⁸ *New York Times Co. v. Sullivan*, 1964, 376 U.S. 254, 284-85.

²⁹ *Sulzbacher v. Continental Cas. Co.*, 8 Cir. 1937, 88 F.2d 122.

It should be noted that the learned district judge in the present case did not deny the defendant's motion for a new trial on the basis that the defendant had "waived" the constitutional rights defined in *New York Times Co.*, but, instead, considered the motion for new trial on its merits. [R. pp. 1464-68.]

[fol. 1662] As to the questions now to be considered, there can be no issue of waiver.

The punitive damages, either as found by the jury or as fixed by the court, are many times greater in amount than the general damages. Under the court's instructions to the jury, the general damages included compensation "for the mental anguish, pain, mortification; and humiliation he has experienced as a result of the publication." (R. 1354) The punitive damages included no element to which the plaintiff was entitled by way of compensation, but, according to the court's instruction to the jury, "the purpose of punitive damages is to deter the defendant from a repetition of the offense and is a warning to others not to commit a like offense. It is intended to protect the community and has an expression of ethical indignation, although the plaintiff receives the award." (R. 1356) The statute which allows the jury to impose punitive damages is Georgia Code Annotated § 105-2002, which reads:

"In every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff."

In the present case "compensation for the wounded feelings of the plaintiff" had been included in the general damages. [See R., p. 1354, quoted *supra*.] The trial court expanded considerably on the alternative purpose "to deter [fol. 1663] the wrongdoer from repeating the trespass"; it included also "a warning to others not to commit a like offense," the protection of "the community," and "an expression of ethical indignation." [See R., p. 1356, quoted *supra*.] The jury was bound to observe the instructions of the court. For the purpose of considering whether the jury's award of punitive damages exceeded constitutional bounds, it is of no moment that it may also have exceeded

the limits set by the statute.³⁰ The court further instructed the jury that, "... if you decide to award punitive damages, the sum you award need have no relationship to any amount that you may award for general damages. It may be greater or it may be less. That is a matter which rests in your sole discretion." [R., p. 1356.] The jury could reasonably infer that no limit was placed on the exercise of its discretion.

If the defendant corporation had been tried under the Georgia criminal libel statute,³¹ it might have been punished by a fine "not to exceed \$1,000."³² As it is, the defendant stands subjected to a judgment of \$400,000 for punitive damages, four hundred times the maximum fine for criminal libel. Evidently, the \$400,000 sufficed to express the trial judge's sense of "ethical indignation" while that of the jurors swelled to \$3,000,000—3,000 times the [fol. 1664] maximum fine which could have been imposed in a criminal prosecution.

Further, in a criminal proceeding, the defendant was subject to *no* fine unless proved guilty beyond a reasonable doubt, while here the judge charged the jury that "... the defendant, Curtis Publishing Company, has the burden of proving by a preponderance of the evidence that the statements contained in this article are true" (R., p. 1347.)

I would not imply that the return of punitive damages in the ordinary case is constitutionally suspect, for more than a century ago the Supreme Court commented:

³⁰ According to the brief of the appellee, plaintiff (p. 86): "It is apparent that the purpose of this Code section in cases of defamation is to deter the defendant from republishing this one particular libel at a later date. It does *not* prevent the defendant from publishing any *other* matter, whether thought libelous of the plaintiff or not." (Emphasis the appellee's.)

³¹ Ga. Code Ann. § 26-2101.

³² Ga. Code Ann. § 26-2101.

"It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured."

Day v. Woodworth, 1851, 54 U.S. (13 How.) 362, 370-71. [fol.1665] The theory of punitive damages involves a blending of the interests of society in general with those of the aggrieved individual in particular.³³ There can be no serious question but that the Georgia statute permitting "additional damages"³⁴ is constitutional upon its face.

However, as that statute was applied by (1) the court's instructions to the jury, (2) the jury's verdict, and (3) the reduced judgment ultimately entered by the court on motion for new trial, the award of punitive damages in the present case is tantamount to a criminal fine or penalty. As said in the very recent case of *United States v. Archie Brown*, U.S. Oct. Term, 1964, No. 399, decided June 7, 1965:

"It would be archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several pur-

³³ *Bryson v. Bramlett*, Tenn. 1958, 321 S.W. 2d 555, 557; *Margaret Ann Super Markets v. Dent*, Fla. 1953, 64 So.2d 291-92; *Pratt v. Duck*, Tenn. Ct.App. 1945, 191 S.W.2d 562, 564-65; *Foster v. Bourgeois*, Tex.Civ.App. 1923, 253 S.W. 880, 885, aff'd 259 S.W. 917; 15 Am.Jur. Damages, §266; 25 C.J.S. Damages, §117.

³⁴ Ga. Code Ann. § 105-2002, quoted *supra*, p. 47.

poses: retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.”

Similarly, in *Trop v. Dulles*, 1958, 356 U.S. 86, 96, it was said:

“In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose [fol. 1666] of the statute.¹⁸ If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal.¹⁹ But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.²⁰

“¹⁸ Of course, the severity of the disability imposed as well as all circumstances surrounding the legislative enactment is relevant to this decision. See, generally, Wormuth, *Legislative Disqualifications as Bills of Attainder*, 4 Vand.L.Rev. 603, 608-610; 64 Yale L.J. 714, 722-724.

“¹⁹ E.g., *United States v. Lovett*, *supra* [328 U.S. 303]; *Pierce v. Carskadon*, 16 Wall. 234; *Ex parte Garland*, 4 Wall. 333; *Cummings v. Missouri*, 4 Wall. 277.

“²⁰ E.g., *Mahler v. Eby*, 264 U.S. 32; *Hawker v. New York*, 170 U.S. 189; *Davis v. Beason*, 133 U.S. 333; *Murphy v. Ramsey*, 114 U.S. 15.”

Footnote 18 to the text just quoted makes clear that the enormity of the verdict and even of the final judgment are relevant factors to be considered in determining whether the punitive damages amount to a criminal fine.

I submit that there is no difference in substance between the punitive damages imposed in the present case and criminal punishment—an ex post facto punishment 400 times as great as the defendant could have anticipated [fol. 1667] from the criminal libel statute,³⁵ and imposed without any of the procedural safeguards which are required in criminal proceedings by due process.³⁶

If there should be any doubt that the award of \$400,000 in damages strictly punitive violates the due process clause for lack of the safeguards required in criminal proceedings, there can be none, I submit, that it amounts to a prior restraint upon freedom of the press. The rule as announced in *New York Times Co. v. Sullivan*, 1964, 376 U.S. 254, 277-78, has clear application to the facts of this case:

“What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. See *City of Chicago v. Tribune Co.*, 307 Ill. 595, 607, 139 N.W. 86, 90 (1923). Alabama, for example, has a criminal libel law which subjects to prosecution ‘any person who speaks, writes, or prints of and concerning another any accusation falsely and maliciously importing the commission by such person of a felony, or any other indictable offense involving moral turpitude,’ and which allows as punishment upon conviction a fine not exceeding \$500 and a prison sentence of six months. Alabama Code, Tit. 14, §350. Presumably a person [fol. 1668] charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a rea-

³⁵ Ga. Code Ann. § 26-2101; compare art. 1, sec. 9, clause 3 of the Constitution.

³⁶ See amendment 5 to the Constitution.

sonable doubt. These safeguards are not available to the defendant in a civil action. The judgment awarded in this case—without the need for any proof of actual pecuniary loss—was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act. And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication. Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive. Plainly the Alabama law of civil libel is 'a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law.' *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70."³⁷

For yet another reason the award of \$3,000,000 by the jury, or of \$400,000 by the court, as punitive damages is unconstitutional and void. There was no semblance of definite standard or controlling guide to govern the award.³⁸ Can any standard be more vague or arbitrary than "an [fol. 1669] expression of ethical indignation" first on the part of the jury and then on the part of the trial judge? It must be remembered that stricter standards of permissible vagueness are applicable to a rule having a potentially inhibiting effect on freedom of the press than are applicable to rules relating to less important subjects.³⁹

³⁷ See also *Cantwell v. Connecticut*, 1940, 310 U.S. 296, 306; *Near v. Minnesota*, 1931, 283 U.S. 697, 713-14, 720-23.

³⁸ *Staub v. City of Baxley*, 1958, 355 U.S. 313, 322.

³⁹ *Smith v. California*, 1959, 361 U.S. 147, 151; *Crump v. Board of Public Instruction*, 1961, 368 U.S. 278, 287.

Still further, I submit that the remittitur violates the defendant's rights under the seventh amendment. The trial judge concluded "that the award for punitive damages in this case was grossly excessive. It is the court's considered opinion that the maximum sum for punitive damages that should have been awarded against Curtis Publishing Company should be \$400,000.00." [R., p. 95] In another part of his opinion on motion for new trial, the district judge commented: "The award for punitive damages in the case under consideration is more than seventeen times larger than the highest award for punitive damages ever sustained." [R., p. 93.] The district judge's opinion is silent as to the underlying reason for such a grossly excessive verdict. The majority opinion says that "... the judge necessarily rejected the idea that this verdict had been infected by such destructive elements [as passion or prejudice]." [Majority opinion, p. 28.] With deference, I submit that that conclusion is not based on the record or on anything said by the trial judge. To the contrary, in colloquy with counsel, the judge may well have disclosed his view as to why the judgment was excessive: "Suppose the court should determine that probably a certain portion of the argument was improper, and [fol. 1670] therefore the verdict was excessive, and grant you a new trial on that ground, and then it was tried again" [R., p. 1373.]

The majority of this Court labors under a different impression. It several times refers to the defendant's new policy of "sophisticated muckraking" without benefit of what the defendant claimed that it meant by that expression [R., pp. 37-38, 1019.] :

"Defendant admits that beginning in the latter part of 1962, The Saturday Evening Post adopted an editorial policy of 'sophisticated muckraking' in the sense of printing the truth about the grave dangers facing the country, including the threat from outside the country and the deterioration of moral values within the country." [R., pp. 37-38.]

It was, of course, for the jury to say whether the defendant's explanation was true. In any event, I agree with the majority that the expression "was by itself more than enough to inflame the jury." [Opinion, pp. 21-22.] If, as is impliedly conceded, the jury was "inflamed," then was not passion and prejudice the most probable cause for its grossly excessive verdict? The majority continues, "Counsel for Butts could only gild the lily." [Opinion, p. 22.] I am tempted to facetiously comment on their plentiful supply of "gilt," but, in a more serious vein, I must express my shock and surprise that this Court will leave standing what amounts to severe criminal punishment of the defendant in the face of the highly improper and prejudicial argument of plaintiff's counsel.

[fol. 1671] The majority says that "some of the argument was invited . . .," but is not more specific as to the particular argument of defendant's counsel which amounted to an invitation. However, the appellee's brief (p. 93) refers to the following:

"Mr. Cody's exact words were: (R. 1267)

" 'The point I want to make is that a man [plaintiff] that will go to one of your public officials [Comptroller General], *bet* enough to start into this business and a lot of other businesses while he is charged with the duty of Athletic Director, but it is worse, in order to obtain the license to do that, to misrepresent your financial condition.' (Emphasis added)."

In response, there is attached to appellant's reply brief as Exhibits A and B, the affidavit of Mr. Cody supported by the affidavit of Rufus L. Hixon, the official court reporter. The court reporter's affidavit is to the effect that "after deponent had examined his stenotype notes, he telephoned Mr. Bondurant to state that the word 'bad' had been used by Mr. Cody in his closing argument but that the word 'bet' had been erroneously transcribed." [Exhibit B, p. 8a, Appellant's Reply Brief.]

In addition, I would note that in beginning his argument, counsel for the defendant referred to his attachment to the University of Georgia and to the fact that the trial judge, opposing counsel, and he had received their training in that institution. The arguments of counsel are set forth in the record (pp. 1257-1341). They do not, in my opinion, [fol. 1672] disclose any invitation or provocation to justify or excuse the improper and inflammatory argument of plaintiff's counsel. The following excerpts are only samples of the objectionable parts of that argument, but, I submit, that they speak so loudly as not to require comment:

"Since he talked to you about the University of Georgia and when he was there, I think I likewise have a right to mention to you briefly that I probably have known Wally Butts longer than any man in this case. I was at Mercer University with Wally Butts when he played end on the football team there. He was in some respects a small man in stature, but he had more determination and more power to win than any man that I have ever seen in my life. I would not stand before you in this case today arguing in his behalf if I thought that Wally Butts would not tell you the truth when he raises his hand on this stand and swears to Almighty God that what he is going to tell you is the truth. [R., p. 1289]

" . . .

"Somebody has got to stop them. There is no law against it, and the only way that type of, as I call it, yellow journalism can be stopped is to let the Saturday Evening Post know that it is not going to get away with it today, tomorrow, or any more hereafter, and the only way that lesson can be brought home to them, Gentlemen, is to hit them where it hurts them, and the only thing they know is money. They write about human beings; they kill him, his wife, his three lovely [fol. 1673] daughters. What do they care? They have got money; getting money for it.

" . . .

"I am looking to you for my protection. Heavens (sic) knows, if you let them out of this case for five million dollars or less, and boy, it's been worth it to them, I may be next, because they are not going to stop with that. You may be next; my wife; my children; yourself. We have got to stop them now, and you are the only twelve in the world that can stop them. [R., p. 1319.]

"...
 "I say, Gentlemen, this is the time we have got to get them. A hundred million dollars in advertising, would ten percent of that be fair to Wallace Butts for what they have done to him? Would a fifty cent assessment on each of the twenty-three million issues which they wrote about him there, would that be a strain or a burden on them? I think it would teach them that we don't have that kind of journalism down here, and we don't want it down here, and we don't want it to spread from 666 Fifth Avenue any further than that building right now.

"...
 "My time is up, I have done the best I can. I have lived in agony with this man since I got the first notice that this was what was going to happen, this Post article was coming out. I have seen him deteriorating even since it came out, and I have lived in agony along [fol. 1674] with him, and it may be that the personal first-hand knowledge that I have had since almost living with him and his family every day, I may have said some things or done some things or conducted myself in some manner that was displeasing to you. All I can say, I have done my best, and if I have done any of those things, don't hold it against Wallace Butts.

"You know, one of these days, like everyone else must come to, Wallace Butts is going to pass on. No one can bother him then. The Saturday Evening Post can't get at him then. And unless I miss my guess,

They will put Wallace Butts in a red coffin with a black lid, and he will have a football in his hands, and his epitaph will read something like this: 'Glory, Glory to old Georgia.' " [R., pp. 1321-22.]

If this dissent serves no other purpose, it will at least preserve for posterity the colorful peroration last quoted. Seriously, it seems to me that "the public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice." *N.Y. Central R.R. Co. v. Johnson*, 1929, 279 U.S. 310, 318. That would be true even if the prejudicial argument had not been followed by a grossly excessive verdict. I submit that the \$3,000,000 punitive damage verdict was so clearly the result of passion and prejudice that it could not be cured by remittitur.⁴⁰

[fol. 1675] It is difficult in any case to reconcile the practice of remittitur with the constitutional right of a defendant to trial by jury.⁴¹ The logic of Professor Carlin's article on Remittiturs and Additurs (1942), 49 W.Va. LQ 1, 17, 18, quoted in 6 Moore F.P. (2d ed.) 3738-39, seems to me unanswerable.⁴²

That logic is peculiarly applicable to the circumstances of this case, where only punitive damages are reduced and there is no rule or standard by which the judge can separate any good part of the verdict from the bad. In effect, the remittitur from \$3,000,000 to \$400,000 represents nothing more specific than the difference between the jury's

⁴⁰ *Minneapolis, St.P. & S.S.M. Ry. Co. v. Moquin*, 1931, 283 U.S. 520; *Brabham v. State of Mississippi*, 5 Cir. 1938, 96 F.2d 210; *Ford Motor Co. v. Mahone*, 4 Cir. 1953, 205 F.2d 267; *National Surety Co. v. Jean*, 6 Cir. 1932, 61 F.2d 197.

⁴¹ See *Dimick v. Schiedt*, 1935, 293 U.S. 474, 482-87.

⁴² See 6 Moore, F.P. (2d ed.) ¶ 59.05(3); 3 Barron & Holtzoff, ¶ 1305.1; 30 Am.Jur. New Trial, §§ 209, et seq.; 66 C.J.S. New Trial, §§ 209, et seq.

and the judge's sense of "ethical indignation." The jury's verdict cannot be recognized in the final judgment.

I appreciate that in the federal courts the right to a jury trial is to be determined as a matter of federal law in diversity as well as other actions.⁴³ It is, however, both interesting and instructive to refer to Georgia law. The statute permitting the award of punitive damages,⁴⁴ says that "... *the jury may give additional damages . . .*" (Emphasis supplied.) Another statute prescribes: "The question of damages being one for the jury, the court should [fol. 1676] not interfere, unless the damages are either so small or so excessive as to justify the inference of gross mistake or undue bias." Ga. Code Ann. § 105-2015.

It has long been the law of Georgia that "the trial judge has no power to order that, as a condition to the refusal of a new trial, a portion of the verdict shall be written off as excessive, except where from the application of the law to the evidence, the excess can be accurately ascertained." Syllabus 4 by the Court, *Central of Ga. Ry. Co. v. Perkerson*, 1901, 112 Ga. 923, 38 S.E. 365. That action was for the death of a railroad employee. The plaintiff recovered a verdict for \$10,833.33. The trial court ordered a new trial conditioned on the plaintiff's consent to a remittitur of the part of the verdict in excess of \$8,500.00, and, upon plaintiff's consent, entered judgment for that amount. On defendant's appeal, the Supreme Court of Georgia reviewed the authorities at length and reversed. A part of its opinion reads:

"It is manifest that the verdict for \$8,500 was rendered by the judge, and not by the jury, and it is im-

⁴³ *Simler v. Conner*, 1963, 372 U.S. 221-22; *Ammons v. The Franklin Life Ins. Co.*, 5 Cir., No. 21418, decided June 28, 1965. Nonetheless, it does seem anomalous for the federal courts to require the state courts to accord the strictest guaranty of jury trial when indicated by a federal statute (e.g., the Federal Employers' Liability Act), and then, in a diversity case to refuse to recognize the requirement of jury trial imposed by a state statute.

⁴⁴ Ga. Code Ann. § 105-2002, quoted *supra* p. 47.

possible to ascertain from the evidence in the case how he arrived at that exact amount. It is evident from his order that he was dissatisfied with the verdict, as to the amount of damages found, and that, if he had not thought he had the power of remitting a portion of the damages, he would have set the verdict aside and granted a new trial upon the ground that the verdict was excessive. The judge may have the power to determine that a verdict is grossly excessive, and for that cause to order it set aside, and yet have [fol. 1677] no power to fix the exact amount for which it should stand. 'The power to control does not include the power to find. Like the executive veto, it arrests, but does not by its exercise bestow the power to enact.'"

Even more pertinent is a very recent case where the trial court, with plaintiff's consent, reduced the exemplary or punitive damages awarded by the jury from \$4,000 to \$1,500. The conditional judgment for new trial was reversed with directions that a new trial be granted. The Court said:

"In determining punitive or exemplary damages it is impossible to lay down any fixed rules for a precise mathematical calculation; 'and in every such case the amount of the finding must be largely in the power of the jury, who have no other guide but their enlightened consciences. To say, therefore, in such cases that this finding should not have exceeded a certain sum, is to invade their peculiar province, and to assume their functions; and to require a portion of the amount so found by them to be remitted, and the balance to stand as their verdict, seems to us unauthorized either by the words of the law, or by the precedents and practice in such cases.' Savannah, Florida & Western Ry. v. Harper, 70 Ga. 119, 123-124 [citing many other authorities].

"It is our wish to make it clear that nothing held here or in any of the authorities cited is subject to the inference that a trial judge is restricted in the [fol. 1678] exercise of his exclusive discretion to grant or deny a motion for new trial on the general grounds. We do emphasize that where the determining of the amount of a particular class of damages lies exclusively with the jury, the trial court must either grant or deny a new trial on the basis of the jury's award. The trial judge cannot condition the exercise of his discretion in granting or denying a new trial on an acceptance by the parties of a different sum selected by him."

City Motor Exchange v. Ballinger, Ga. App. 1964, 138 S.E. 2d 925, 926-27.

The seventh amendment guarantees a right of trial by jury to the defendant as well as to the plaintiff. I cannot escape the conviction that by the remittitur in this case that right has been denied to the defendant.

Both because *New York Times v. Sullivan* is convincing that this case was tried upon fundamentally erroneous principles of law, and because the enormous award of punitive damages and the remittitur violate the defendant's constitutional rights, I would reverse the judgment of the district court. I therefore respectfully dissent.

[fol. 1680]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1964

No. 21491

D. C. Docket No. 8311—Civil Action

CURTIS PUBLISHING COMPANY, Appellant-Appellee,

versus

WALLACE BUTTS, Appellee-Appellant.

(And Reverse Title)

Appeals from the United States District Court for the Northern District of Georgia.

Before Rives and Brown, Circuit Judges, and Spears, District Judge.

JUDGMENT—July 16, 1965

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant-appellee, Curtis Publishing Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Rives, Circuit Judge, dissents.

Issued as Mandate:

[fol. 1681]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21,491

[Title omitted]

PETITION FOR REHEARING EN BANC AND BRIEF IN SUPPORT
THEREOF—Filed August 4, 1965

[fol. 1683] Appellant Curtis Publishing Company respectfully moves the Court to grant a rehearing *en banc* upon the unusually important questions presented and to secure uniformity in the decisions of the Court for the following reasons:

1.

The majority of the panel of this Court found that the Appellant Curtis Publishing Company knowingly and intentionally waived basic rights under the First Amendment even before they were announced by the Supreme Court in *The New York Times Company v. Sullivan*, [fol. 1684] 376 U.S. 254, 84 Sup. Ct. 710, 11 L. Ed. 2d 686 (1964). The *Times* decision for the first time extended the protection of the First Amendment to libel. Not even the New York Times' counsel who prepared the petition for certiorari anticipated the grounds on which the Supreme Court ultimately decided the *Times* case. The refusal of the majority to consider these basic constitutional issues is in direct conflict with the decisions of the Supreme Court in *Hormel v. Helvering*, 312 U.S. 552, 61 Sup. Ct. 719, 85 L. Ed. 1037 (1941) and *Helvering v. Richter*, 312 U.S. 561, 61 Sup. Ct. 723, 85 L. Ed. 1043 (1941), and that of this Circuit in *Cobb v. Balkcom*, 339 F.2d 95 (5th Cir. 1964) and the cases cited therein.

[File endorsement omitted]

2.

The refusal of the majority of this Court to consider the important constitutional principles announced in *The New York Times Company v. Sullivan* is based upon a deciding vote by District Judge Spears. Since Judge Rives' opinion conflicts directly with that of Judge Brown on this issue affecting basic rights under the First Amendment, a rehearing *en banc* should be granted in order that uniformity in the decisions of this Court may be insured. "[I]t is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski v. United States*, 353 U.S. 901, 77 Sup. Ct. 633, 1 L. Ed. 2d 658 (1957). Rehearings *en banc* have been granted by this Court in many cases in which there was a strong dissent and even without a District Judge casting the deciding vote on the panel. See e.g., *Noah v. Liberty Mutual Insurance Company*, 267 F.2d 218 (5th Cir. 1959); *Howard v. United States*, 232 F.2d 274 (5th Cir. 1956).

[fol. 1685]

3.

The applicability of the new First Amendment principles of *The New York Times* case to the plaintiff as a "public official" is a question of major importance which has been expressly left by the Supreme Court to be decided by the lower federal courts in the first instance and should be decided by this Court *en banc* in order that the trial courts in this Circuit may be guided thereby.

4.

The affirmance of the unprecedented and excessive award of punitive damages violates Appellant's constitutional rights:

(a) The granting of a remittitur rather than a new trial where the \$3,000,000 verdict for punitive damages has been held by the trial court to be "grossly excessive" violated the defendant's right to trial by a fair

and impartial jury, which is guaranteed by the Seventh Amendment.

(b) The award of punitive damages in such an excessive amount is tantamount to a penal sanction which, under *The New York Times Company v. Sullivan* case and others, cannot constitutionally be imposed without the procedural safeguards which are required in criminal proceedings and sufficient standards for jury guidance.

5.

The Court incorrectly allowed an excessive jury verdict, which was the product of erroneous trial rulings [fol. 1686] and instructions, as well as passion and prejudice, to stand.

Respectfully submitted,

Welborn B. Cody, Harold E. Abrams, Emmet J. Bondurant, Thomas E. Joiner.

Of Counsel:

Kilpatrick, Cody, Rogers, McClatchey & Regenstein, 1045 Hurt Building, Atlanta, Georgia 30303.

Philip H. Strubing

Of Counsel:

Pepper, Hamilton & Scheetz, Fidelity-Philadelphia Trust Building, Philadelphia, Pennsylvania 19109.

Certificate of Counsel

I, Harold E. Abrams, one of the attorneys for the Appellant Curtis Publishing Company, certify that this Petition is presented in good faith, that it is not interposed for a delay, and that in my judgment it is well founded.

This day of August, 1965.

Harold E. Abrams, 1045 Hurt Building, Atlanta, Georgia 30303, Attorney for Appellant, Curtis Publishing Company.

[fol. 1687]

Certificate of Service

It is hereby certified that a copy of this Petition has been served upon counsel for the opposing party in the foregoing matter by depositing in the United States mail a copy of same in a properly addressed envelope with adequate postage thereon.

This day of August, 1965.

Harold E. Abrams, 1045 Hurt Building, Atlanta, Georgia 30303, Attorney for Appellant, Curtis Publishing Company.

[fol. 1695]

BRIEF IN SUPPORT OF PETITION
FOR A REHEARING EN BANC

I.

The Refusal of the Majority to Consider the Fundamental Constitutional Issues Presented Under the First and Fourteenth Amendments on the Basis of the Subsequent Decision of the Supreme Court in *The New York Times Company v. Sullivan* Because of the Alleged Waiver of These Basic Rights by the Defendant is Clear Error and Directly Conflicts With the Decision of the Supreme Court in *Hormel v. Helvering*.

[fol. 1696] . In *The New York Times Company v. Sullivan*, 376 U.S. 251, 84 Sup. Ct. 710, 11 L.Ed.2d 686 (1964), the Supreme Court for the first time extended the protection of the First Amendment to libel cases. These new constitutional principles, under which false statements, as well as those which are true, received constitutional protection, unless shown by the plaintiff to have been made with "actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not," radically changed the substantive law previously

applicable to libel cases.¹ Until the decision in the *Times* case, the Supreme Court had repeatedly stated that "libelous utterances are not within the area of constitutionally protected speech." *Roth v. United States*, 354 U.S. 476, at 483-84, 77 Sup. Ct. 304, 1 L.Ed.2d 1498 (1957); *Beauharnais v. Illinois*, 343 U.S. 250, at 266, 72 Sup. Ct. 725, 96 L.Ed.2d 919 (1952); *Near v. Minnesota*, 283 U.S. 697, 51 Sup. Ct. 625, 75 L.Ed. 1357 (1931).

Despite the clear applicability of the new constitutional [fol. 1697] principles,² the majority refuses to apply them

¹ The *Times* case forbids the recovery of general or punitive damages unless the plaintiff proves with "convincing clarity," not only that the statements were false, but that they were published with knowledge that they were false or with reckless disregard of whether they were false or not. In the *Times* case, the failure of the New York *Times* to check information in its own files which would have disclosed the falsity of its charges was held insufficient to prove reckless disregard of truth with "the convincing clarity which the constitutional standard demands." In *Garrison v. Louisiana*, 379 U.S. 64, 85 Sup. Ct. 209, 13 L. Ed. 2d 125 (1964), proof that the libelous charges were made "without a reasonable belief in their truth" was held insufficient under the *Times* case. It cannot be seriously argued that these decisions did not drastically change the constitutional principles heretofore applicable in libel cases.

² Since Judge Rives was prevented by considerations of judicial administration from reviewing the evidence in the present record to determine whether it could constitutionally support a judgment, and since the majority declined to review the evidence which unquestionably demonstrates the lack of actual malice on the part of the *Post*, the following summary is necessary:

The defamatory charge in the instant case was that Butts, while Athletic Director of the University of Georgia, gave information about the Georgia football team to the Alabama Coach, Paul Bryant, prior to the Georgia-Alabama game, which was calculated to affect the outcome of the game. There is no evidence to show that the persons in the *Post* organization having responsibility for the publication of the article "knew" that the charges contained in "The Story of a College Football Fix" were false, either at the time of its publication or at any other time. Indeed, the evidence is clearly to the contrary, and it convincingly demonstrates the belief of the

to the present case because of what the majority asserts to be a waiver of these rights by the defendant. This waiver is based on alleged facts, most of which are outside the record, and a consequent finding that Curtis was repre-

Editors of the *Post* in the truth of the article. (R. 945-46, 957, 1014-15).

Nor is there evidence that the *Post* article was published "with reckless disregard of whether it was false or not." From the outset, *Post* had been interested only in getting the truth of the entire story. (R. 957). *Post* employed Frank Graham, an experienced sports writer, to make a *complete investigation*. (R. 952, 954, 957). Graham was *instructed* to be careful, that this was a big story. (R. 957). He was to proceed with the *utmost thoroughness* (R. 954, 957), to dig to get all available facts (R. 952-53), and to *verify* the story. (R. 926). After Graham had completed the article, he submitted it to Davis Thomas, Managing Editor of the *Post*. (R. 1021). Because of the nature of the charges made in the article, Thomas reviewed the article to make certain great care had been exercised (R. 1015, 1021) and that every significant source of information had been checked in advance of publication. (R. 1014-15). In approving the article for publication, Thomas attached prime significance to the *affidavit* executed by Burnett, which confirmed Thomas' belief in the truth of statements contained in the article. (R. 1015). The article was then submitted to Clay Blair, Editor-in-Chief of Curtis Publishing Company, for his approval. Blair was careful to see that the article had been checked thoroughly as to its truth. (R. 945-46). The article was approved for publication only after Blair was satisfied that the statements contained in the article were true and accurate. (R. 945-46).

The *Post* relied on information given it by George Burnett in which he described in detail the substance of the September 13 call between Wallace Butts and Paul Bryant. This information was reaffirmed in a sworn affidavit signed by Burnett at *Post's* request. (R. 494, 508, 1015). The *Post* also knew that the September 13 call had been confirmed by *long distance records of the telephone company*. (R. 909). The defendant knew that the person who was best able to evaluate this information, Georgia Head Coach Johnny Griffith, had stated his opinion that if such information had been given to Coach Bryant prior to the Georgia-Alabama game, it *could have affected the outcome*. (R. 219, 317, 901). Burnett's story was further confirmed by the knowledge that the

sented in Alabama by the same attorneys who had [fol. 1699] represented the New York Times in the lower courts. On the basis of this novel "finding" the majority imputed knowledge of the yet unannounced constitutional principles of the *Times* case to Curtis' trial counsel.³ The majority thus held that the constitutional protections afforded by the *Times* case to have been knowingly and in-

whole matter had been thoroughly investigated by the University of Georgia and the Board of Regents. (R. 911). The *Post* knew that in the course of this investigation, Burnett had voluntarily taken and passed a lie detector test administered by a recognized expert. (R. 908). The Editors of the *Post* were also aware that Butts, when confronted with the information disclosed by the University's investigation, had refused to submit to a lie detector test, and had abruptly resigned on the following day. (R. 879).

Further confirmation of the story was provided by the discovery that an outstanding local sports writer, *Furman Bisher*, investigating this matter independently from different sources, had reached substantially the same conclusions. (R. 494). As an additional precaution, however, Bisher was employed to complete the investigation, particularly in talking to University authorities with whom he had more entrees. (R. 494). The final story was later submitted to Bisher, who made no corrections. (R. 518).

It is hardly necessary to argue that appellant's refusal to retract the article on demand was "not evidence of malice for constitutional purposes." 376 U.S. at 286. Indeed, the Supreme Court expressed doubt that a refusal to retract could ever constitute such evidence; certainly it cannot amount to such evidence when other uncontradicted evidence demonstrates affirmatively that the publisher justifiably believed in the truth of the defamatory statement.

The evidence outlined above makes it quite clear that no finding of malice on the part of the *Post* can be sustained under the principles of the *New York Times* and *Garrison* cases.

³ Appellate courts do not allow a party to depart from the record on appeal by becoming an unsworn witness for his client. See *Lawn v. United States*, 355 U.S. 339, 78 Sup. Ct. 311, 2 L.Ed.2d 321 (1958) ("we must look only to the certified record in deciding questions presented"). The obvious reason for such a rule is that the court may be misled to an unsound conclusion. Such is the instant case in which the majority has concluded from unsworn

tentionally waived by the defendant's failure to raise them in a timely manner at the trial.

The majority seeks to attribute knowledge of the unannounced constitutional principles of the *Times* case to Curtis based upon "its interlocking battery" of counsel, one of whom also represented the *Times* in the Alabama courts. Yet, as Judge Rives has emphasized, even the petition for certiorari filed by Herbert Wechsler, the eminent constitutional authority and lead counsel for the New York *Times*, did not enunciate the constitutional principles which [fol. 1700] were ultimately decided by the Supreme Court. Thus, it was impossible for trial counsel to predict the outcome of the *Times* case.

The tortuous theory of "waiver" found by the majority to preclude review is in direct conflict with the decisions of the Supreme Court in *Hormel v. Helvering*, 312 U.S. 552, 61 Sup. Ct. 719, 85 L.Ed. 1037 (1941), and *Helvering v. Richter*, 312 U.S. 561, 61 Sup. Ct. 723, 85 L.Ed. 1043 (1941). In *Hormel v. Helvering*, supra, the taxpayer sought review before the Board of Tax Appeals of a deficiency which had been assessed against him on the basis of income from a family trust. The Commissioner defended the assessment solely on the basis of Sections 166 and 167 of the Internal Revenue Code. In that proceeding, the Commis-

sioned statements in Butts' brief, which for the most part are not true, that there was "full communication among Curtis' counsel" in regard to the possible applicable constitutional decision in the *Times* case, which led to Curtis' intentional relinquishment or abandonment of a known right." As is shown by the attached affidavits of Mr. Philip H. Strubing, Curtis General Counsel; Mr. Welborn B. Cody, leading trial counsel in the Butts case; and Mr. Eric Embry, Curtis counsel in the Bryant libel action in Birmingham, Alabama, the Alabama counsel attended the Butts trial merely as spectators and at no time were they consulted in regard to trial strategy. More important, at no time prior to or during the trial were they asked to, nor did they suggest, the raising of any constitutional defenses. None of Curtis' counsel intended to waive any constitutional defense which Curtis may have had in the Butts case. It is certainly shocking that a party can be deprived of basic constitutional rights upon such a tenuous basis.

sioner was represented by W. Frank Gibbs. Four months prior to the *Hormel* case, the Commissioner, represented by the same attorney, W. Frank Gibbs, had successfully asserted a deficiency against income from a similar trust under Section 22(a) of the Internal Revenue Code. *George B. Clifford, Jr.*, 38 B.T.A. 1532, CCH Decision 110,446-B. Notwithstanding this fact, however, no claim under Section 22(a) was made by Mr. Gibbs before the Board of Tax Appeals in the *Hormel* case. On January 31, 1939, the Board of Tax Appeals rejected the Commissioner's position under Sections 166 and 167. *Hormel v. Comm'r.*, 39 B.T.A. 244 (1939). Six months thereafter, on July 19, 1939, the *Clifford* decision was reversed by the Eighth Circuit [*Clifford v. Helvering*, 105 F.2d 586 (8th Cir. 1939)] and the Commissioner petitioned for certiorari.

On February 26, 1940, while the Commissioner's appeal in the *Hormel* case under Sections 166 and 167 was [fol. 1701] pending before the Eighth Circuit, the Supreme Court decided the *Clifford* case and held the trust income to be taxable under Section 22(a). *Helvering v. Clifford*, 309 U.S. 331, 60 Sup. Ct. 554, 84 L.Ed. 788 (1940). Because of the change in judicial interpretation of the *Clifford* case, the Commissioner was permitted to assert liability under Section 22(a) for the first time in the Court of Appeals, notwithstanding the fact that Section 22(a) had not been relied upon before the Board of Tax Appeals. *Helvering v. Hormel*, 111 F.2d 1 (8th Cir. 1940). Affirming the decision of the Eighth Circuit, the Supreme Court held, "[W]e are of the opinion that the Court below should have given and properly did give consideration to Section 22(a) in determining petitioner's liability." 312 U.S. at 559. (Emphasis added.)

Said the Court:

"These decisions and others like them, while recognizing the desirability and existence of a general practice under which appellate courts confine themselves to the issues raised below, nevertheless do not lose

sight of the fact that such appellate practice should not be applied where the obvious result would be a plain miscarriage of justice. Analogous in principle is the philosophy which underlies this Court's decisions with relation to appellate practices in other cases: . . . [particularly] those in which there have been judicial interpretations of existing law after decision below and pending appeal—interpretations which if applied might have materially altered the result. Whether articulated or not, the philosophy underlying the exceptions [fol. 1702] to the general practice is in accord with the statutory authority given to courts reviewing decisions . . . [d]ecisions not in accordance with law should be modified, reversed or reversed and remanded 'as justice may require.'" 312 U.S. 552, at 557-59 (Emphasis added).

In the companion case, *Helvering v. Richter*, 312 U.S. 561, 61 Sup. Ct. 723, 85 L.Ed. 1043 (1941), the refusal of the Third Circuit to consider the applicability of Section 22(a) under *Clifford* on grounds that it had not been raised by the Commissioner before the Board of Tax Appeals was reversed by the Supreme Court. See also *Uebersee Finanz-Korporation, A.G. v. McGrath*, 343 U.S. 205, 212-13, 72 Sup. Ct. 618, 96 L.Ed. 888 (1952). These decisions make it clear beyond dispute that the failure of the defendant to raise the then unannounced constitutional principles of the *Times* case at the trial is not a basis for this Court's refusal to consider these new constitutional issues on appeal. In view of the *a fortiori* decisions of the Supreme Court in the *Hormel* and *Richter* cases, the refusal of the majority to consider these issues is clearly untenable.

The Supreme Court has repeatedly held that, whenever a fundamental change of law occurs between the trial of a case and the appeal, it is the duty of the appellate court to follow the later decision, even though the issue was not raised in the trial court. *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103; 2 L.Ed. 49

(1801); *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 61 Sup. Ct. 347, 35 L.Ed. 327 (1941); *Hormel v. Helvering*, 312 U.S. 552, 61 Sup. Ct. 719, 85 L.Ed. 1037 (1941); *Zefferin, Inc. v. United States*, 318 U.S. 75, 63 Sup. Ct. 465, 469, 87 L.Ed. 621 (1943); *Standard Oil Co. of Kansas v. [fol. 1703] Angle*, 128 F.2d 728, 730 (5th Cir. 1942); *United States v. Alabama*, 362 U.S. 602, 80 Sup. Ct. 923, 4 L.Ed.2d 92 (1960).

The duty of the appellate court under such circumstances is not discretionary. As Chief Justice John Marshall said in *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103; 2 L.Ed. 49 (1801):

"It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But, if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." 5 U.S. at 110 (Emphasis added).

Only last term the force of these decisions was recognized and applied by the Supreme Court. *Hamm v. City of Rock Hill*, 379 U.S. 306, 85 Sup. Ct. 384, 13 L.Ed.2d 300 (1964); see *Linkletter v. Walker*, — U.S. —, 85 Sup. Ct. 1731 at 1735-36, — L.Ed.2d — (1964).

The majority has thus imposed the impossible burden upon trial counsel of raising constitutional defense in the trial court even before its enunciation by the Supreme Court. The most counsel could have said is that, "I object because the procedure in this case violates some constitutional principle which may be decided by the Supreme Court in the *Times* case." He could do no more. Since under Rule 46 of the Federal Rules of Civil Procedure [fol. 1704] the grounds for an objection must be specifically stated, such an objection would present no issue upon which the trial court might rule and would be woefully inadequate to preserve any issue for purposes of an appeal.

As the Supreme Court has said, "The rule is universal that where an objection is so general as not to indicate the specific grounds upon which it is made, it is unavailable on appeal . . ." *Noonan v. Caledonia Gold Min. Co.*, 121 U.S. 393, 7 Sup. Ct. 911, 915, 30 L.Ed. 1061 (1887); *Knight v. Loveman, Joseph & Loeb*, 217 F.2d 717 (5th Cir. 1954); 2B Barron & Holtzoff, *Federal Practice and Procedure* §1021; 5 Moore, *Federal Practice* ¶46.02.

The authorities are in agreement that the purpose of the requirement of objection in the trial court is two-fold: "(1) to apprise the Court of the litigant's position so that the Court in the furtherance of justice might correct its ruling where shown to be in error; and (2) to permit an opponent to obviate the defect where possible." 5 Moore, *Federal Practice* ¶46.02, page 1902; 2B Barron & Holtzoff, *Federal Practice and Procedure* §1021, at page 310. It is clear that these purposes are not served by the requirement of an objection in the present case. Since the constitutional principles applicable to libel cases had not yet been enunciated by the Supreme Court, there was no occasion to present them to the District Judge for a ruling. Indeed, had any First Amendment question been presented, the District Judge would have been obligated to find, under the prior Supreme Court decisions which were then controlling, that "libelous utterances are not within the area of constitutionally protected speech" (*Roth v. United States*, supra), for there was no other authority under the First [fol. 1705] Amendment. As the Fourth Circuit emphasized in *Walker v. Peppersack*, 316 F.2d 119 (4th Cir. 1963):⁴

"Had timely objection been made to the admission of the illegally obtained evidence when it was offered, there is nothing to indicate that the trial court would have excluded it simply because the searching officers had no warrant. Nor is there any reason to believe that Walker would have been successful had he raised the

⁴ Overruled on other grounds, *Linkletter v. Walker*, — U.S. —, 85 Sup. Ct. 1731, — L.Ed.2d — (1965).

point on direct appeal. Under the Maryland rule of law, no search warrant was required but this rule was in direct and violent conflict with the later decision in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (June 19, 1961).

"The classic statement on waiver of constitutional rights is found in *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938): 'A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.' *At the time of Walker's trial and first appeal, it is clear that he did not intentionally abandon a known right since there was then no such right for him to abandon. That was before the Supreme Court's decision in Mapp.*" 316 F.2d at 127-28. (Emphasis added).

The Court is not required to speculate as to the possible effect which an objection might have had upon the [fol. 1706] trial in the present case. After the decision of the Supreme Court in the *Times* case, the defendant moved immediately for a new trial based upon that decision. Although the plaintiff argued waiver, the District Judge recognized that there had been no waiver of the defendant's rights under the First Amendment by the failure to make an objection at the trial and considered the constitutional defenses under the *Times* case on the merits. Even though the constitutional principles of the *Times* decision were then known and were specifically stated by counsel, Judge Morgan rejected them on the ground that Butts, the Athletic Director of the University of Georgia, was not a "public official" within the meaning of the *Times* case.

Thus, the defendant has been deprived of a determination of controlling constitutional issues of paramount importance solely on the purely technical basis of its failure to make a formal objection at the trial on the unknown constitutional grounds, even though it is clear from Judge Morgan's later ruling after *Times*, that any such objection would have been completely futile.

* Such a rigid adherence to procedural technicalities was condemned by the Supreme Court in *Hormel v. Helvering*, supra:

"Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially-declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which [fol. 1707] had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." 312 U.S. 552, at 557.

As the Supreme Court recently emphasized in *Fay v. Noia*, 372 U.S. 391, 83 Sup. Ct. 822, 849, 9 L.Ed.2d 837 (1963):

"The classic definition of waiver enunciated in *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 Sup. Ct. 1019, 1023, 82 L.Ed. 1461—'an intentional relinquishment or abandonment of a known right or privilege'—furnishes the controlling standard." (Emphasis added).

And it has been repeatedly recognized that "*courts indulge every reasonable presumption against waiver of fundamental constitutional rights.*" *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 Sup. Ct. 1019, 1023, 82 L.Ed. 1461 (1938).

The question of "waiver" presented here is the very antithesis of *Michel v. Louisiana*, 350 U.S. 91, 99, 76 Sup. Ct. 158, 100 L.Ed. 83 (1955), relied upon by the majority. The constitutional claim there involved of systematic exclusion of Negroes from juries had been established for more than three-quarters of a century.⁵ The defendant's failure to invoke this established constitutional right at the trial was [fol. 1708] held to preclude its assertion for the first time

⁵ *Strauder v. West Virginia*, 100 U.S. (10 Otto) 303; 25 L.Ed. 664 (1879). See *Norris v. Alabama*, 294 U.S. 587, 55 Sup. Ct. 597; 79 L.Ed. 1074 (1935).

on appeal. However, in a series of decisions, this Court, notwithstanding the absence of objections, has repeatedly refused to find a knowing waiver of this established constitutional right. See Judges Rives, Bell and Spears in *Cobb v. Balkcom*, 339 F.2d 95 (5th Cir. 1964); Judges Tuttle, Wisdom and Carswell in *Whitus v. Balkcom*, 333 F.2d 496 (5th Cir. 1964); Judges Rives, Brown and Wisdom in *United States v. Wiman*, 304 F.2d 53 (5th Cir. 1962), cert. den., 372 U.S. 915, 83 Sup. Ct. 717, 9 L.Ed.2d 722 (1963); Judges Rives, Brown and Wisdom in *United States v. Harpole*, 263 F.2d 71 (5th Cir. 1958), cert. den., 361 U.S. 838, 80 Sup. Ct. 58, 4 L.Ed.2d 78 (1959). The unwillingness of this Court to find an intentional waiver of established constitutional rights which characterizes these cases is impossible to reconcile with the attenuated theory of waiver which the majority utilizes to bar its consideration of the principles of *The New York Times Company v. Sullivan*.

Further, even if the majority were correct in concluding that the defendant had been guilty of some technical procedural default, the *New York Times* case makes it clear not only that the rules of law which were applied by the trial court were unconstitutional, but also that the result reached by the jury is a patently unconstitutional result which cannot, consistently with the First Amendment, be permitted to stand. As Judge Rives emphasized:

"The present action was tried on a definitely stated theory which was fundamentally and constitutionally deficient. The present action should be tried on the theory set forth by the Supreme Court's decision super-[fol. 1709] vening the district court's judgment, that is, *New York Times Co. v. Sullivan*. In such a situation, it has been held, as far back as 1937, that the duty of the district court is to grant the motion for a new trial."⁶

⁶ Nor can a waiver of defendant's rights under the First Amendment be inferred from its failure to plead fair comment under

The Exorbitant Award of Punitive Damages Even as Reduced by the Trial Court Was So Grossly Excessive as to Violate Defendant's Rights Under the Federal Constitution and Could Not Be Cured by Remittitur.

At the close of the evidence, in the present case, the plaintiff moved for a directed verdict on the issue of liability

Georgia law. In addition to the deficiencies pointed out by Judge Rives, it is clear that the Georgia fair comment rule added little to this defense of truth. In this respect, the Georgia fair comment was identical to that of Alabama, which was held to be constitutionally insufficient in the *Times* case. Prior to the *Times* case, the law of Georgia, like that of many states, afforded no protection for factual misstatements or errors no matter how innocently such errors may have been made. Under Georgia law, the statutory defense of "fair comment" protected only nonmalicious comments which were based on facts which were proven to be true. If any of the underlying facts were untrue, the defense of fair comment was inapplicable and afforded the publisher absolutely no protection, irrespective of his good faith. See e.g., *Barwick v. Wind*, 203 Ga. 827, 831, 48 S.E.2d 523 (1948); *Holmes v. Clisby*, 121 Ga. 241, 249, 48 S.E. 934 (1904); *Kirkland v. Constitution Publishing Co.*, 38 Ga. App. 632, 635, 144 S.E. 821 (1928) (4); Ga. Code Ann. §105-709; Restatement, *Torts* §606. In *Barwick v. Wind*, 203 Ga. 827, 831, 48 S.E.2d 523 (1948), the Supreme Court of Georgia said:

"Section 105-709 declares that 'comments upon the acts of public men in their public capacity and with reference thereto' are deemed privileged communications. However, a publication of and concerning the acts of public officials, if untrue and libelous, is not afforded immunity under this section of the Code. While the acts and conduct of public officials are subject to just criticism and comment by the press, the exercise of such right should be unrestricted only where the statements made in the publication are supported by the facts. A public officer has the same right to protection against newspaper libel as a private citizen. Freedom and 'liberty of the press' do not give a publisher the right to publish libelous statements. *Lowe v. News Publishing Co.*, 9 Ga. App. 103 (5) (70 S.E. 607); *Horton v. Georgian Company*, 175 Ga. 261 (165 S.E. 443)." (Emphasis added).

upon grounds that the defendant had not "proven the truth under the burden it had" of its charges against Butts. Judge Morgan overruled this motion on the express ground that "it would [be] error for this Court to withdraw that issue from the Jury." This contemporaneous ruling of the trial judge and, in the language of Judge Rives, "even a casual reading of the record," demonstrate, beyond dispute, that the issues of fact were properly submitted to the jury which might have found the Post's charges to have been true. Under those circumstances, the jury's award of \$3,000,000 in punitive damages, even as reduced by the trial court, is so grossly excessive as to constitute a violation of defendant's rights under the First, Fifth, Seventh, and Fourteenth Amendments. Judge Rives has expressed it far more eloquently than can counsel:

" . . . The questions hereafter discussed had their genesis in the jury's verdict and are unquestionably preserved for review by the defendant's first motion [fol. 1711] for new trial (R., pp. 46-48). As to the questions now to be considered, there can be no issue of waiver."

Notwithstanding the absence of any such waiver, however, the majority declined to even discuss the following constitutional questions emphasized by Judge Rives:

"If the defendant corporation had been tried under the Georgia criminal libel statute, it might have been punished by a fine 'not to exceed \$1,000.' As it is, the defendant stands subjected to a judgment of \$400,000 for punitive damages, four hundred times the maximum fine for criminal libel. Evidently, the \$400,000 sufficed to express the trial judge's sense of 'ethical indignation' while that of the jurors swelled to \$3,000,000—3,000 times the maximum fine which could have been imposed in a criminal prosecution."

"Further, in a criminal proceeding, the defendant was subject to no fine unless proved guilty beyond a

reasonable doubt, while here the judge charged the jury that "... the defendant, Curtis Publishing Company, has the burden of proving by a preponderance of the evidence that the statements contained in this article are true. . . ." (R., p. 1347).

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"[t]he enormity of the verdict and even of the final judgment are relevant factors to be considered in determining whether the punitive damages amount to [fol. 1712] a criminal fine. I submit that there is no difference in substance between the punitive damages imposed in the present case and criminal punishment—an ex post facto punishment 400 times as great as the defendant could have anticipated from the criminal libel statute, and imposed without any of the procedural safeguards which are required in criminal proceedings by due process.

"If there should be any doubt that the award of \$400,000 in damages strictly punitive violates the due process clause for lack of the safeguards required in criminal proceedings, there can be none, I submit, that it amounts to a prior restraint upon freedom of the press. The rule as announced in *New York Times Co. v. Sullivan*, 1964, 376 U.S. 254, 277-78, has clear application to the facts of this case:

'What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. See *City of Chicago v. Tribune Co.*, 307 Ill. 595, 607, 139 N.W. 86, 90 (1923). Alabama, for example, has a criminal libel law which subjects to prosecution "any person who speaks, writes, or prints of and concerning another any accusation falsely and maliciously . . ." and which allows as punishment upon convic-

tion a fine not exceeding \$500 and a prison sentence of six months. Alabama Code, Tit. 14, §350. Pre-[fol. 1713] sumably a person charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action. The judgment awarded in this case—without the need for any proof of actual pecuniary loss—was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act. And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication. Whether or not a newspaper can survive a succession of such judgments, *the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive. Plainly the Alabama law of civil libel is "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law."* *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70. (Emphasis supplied).

"For yet another reason the award of \$3,000,000 by the jury, or of \$400,000 by the court, as punitive damages is unconstitutional and void. There was no semblance of definite standard or controlling guide to govern the award. Can any standard be more vague [fol. 1714] or arbitrary than 'an expression of ethical indignation' first on the part of the jury and then on the part of the trial judge? It must be remembered that stricter standards of permissible vagueness are applicable to a rule having a potentially inhibiting effect on freedom of the press than are applicable to rules relating to less important subjects.

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"... I must express my shock and surprise that this Court will leave standing what amounts to severe criminal punishment of the defendant in the face of the highly improper and prejudicial argument of plaintiff's counsel."

The majority concedes that if the unprecedented \$3,000,000 punitive damage verdict which Judge Morgan found to be "grossly excessive" was the result of "improper influences such as passion and prejudice," it could not be corrected by remittitur but only by a new trial.

The majority also recognizes that Judge Morgan found the \$3,000,000 punitive damage verdict to be "grossly excessive" and that it exceeded by more than six times the \$400,000 "maximum which the law would accept." Although Judge Morgan made no finding as to the reason for the gross excessiveness of the verdict, as Judge Rives has emphasized:

"... in colloquy with counsel, the judge may well have disclosed his view as to why the judgment was excessive: '*Suppose the court should determine that probably a certain portion of the argument was im-[fol. 1715] proper, and therefore the verdict was excessive, and grant you a new trial on that ground, and then it was tried again. . . .*' [R., p. 1373]."

The cause of the jury's passion and prejudice is not of importance. What is of paramount importance is that, whatever the cause, "no verdict can be permitted to stand which is in any degree the result of appeals to passion and prejudice." *Minneapolis, St. P. & S.S.M. Ry. Co. v. Moquin*, 283 U.S. 520, 51 Sup. Ct. 501, 75 L.Ed. 1243 (1931).

As this Court held in *Brabham v. Mississippi*, 96 F.2d 210, at 213 (5th Cir. 1938):

"Verdicts made excessive by the passion and prejudice springing from indulgence in the jury room in such

feelings cannot be cured by a remittitur, but only by a new trial."

While the majority blandly asserts that "there is not the slightest suggestion that [the trial judge] thought, or even intimated, that the [\$3,000,000] award was based on passion and prejudice" it points to no other basis for this unprecedented award. In *Ford Motor Co. v. Mahone*, 205 F.2d 267 (4th Cir. 1963), Judge Parker held the refusal of the trial court to grant a new trial after finding a \$234,330 personal injury verdict to be excessive by \$100,000, to be an abuse of discretion. He said:

"Verdicts of juries must be kept above suspicion and a judge should not hesitate to set a verdict aside where it is so grossly excessive as to be explained only on [fol. 1716] the basis of sympathy or prejudice. . . . *Nothing else in the record explains the size of the verdict which was more than nine times the maximum amount allowed by law of the state for wrongful death.*" 205 F.2d at 272-73. (Emphasis supplied)

Indeed, the Sixth Circuit considered precisely this situation in *National Surety Co. v. Jean*, 61 F.2d 197 (6th Cir. 1932), in which the trial court made a similar finding of excessiveness. After the jury had returned a verdict of \$25,000, the trial court ordered a remittitur of \$5,000 and overruled the defendant's motion for a new trial. The Sixth Circuit held that in view of the trial court's finding of excessiveness, a new trial, and not remittitur, was the only proper remedy. Said the Court:

"[A]fter a rather full discussion touching the elements of damage involved, the court concluded that its conscience would rest easy if it should suggest a remittitur of \$5,000. The memorandum continued: 'I believe if a remittitur of \$5,000.00 be entered I will overrule the motion for a new trial.'

"This was a definite, though indirect, holding that the verdict was excessive, and, although the memorandum contains no specific statement to that effect, we infer that the court ascribed the error to passion, prejudice or caprice as these were the only causes urged as a basis for its action or mentioned in the memorandum. Indeed, an examination of the record discloses no other reasonable explanation for the holding. [fol. 1717] The suggested remittitur was accepted, judgment for \$20,000 was entered, and the motion for a new trial was overruled. Appellant excepted and assigned error.

"The granting or denial of the motion was in the sound discretion of the trial court, and is not reviewable except for a clear abuse of discretion [citations omitted], but *we do not find it necessary to determine whether there was such abuse in the present case since the trial court itself evidently found that the excessive verdict was the result of passion, prejudice, or caprice. Our question is whether after such finding the trial court may correct the mistake by the suggestion and acceptance of a remittitur and the answer is that it could not.* See *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Moquin*, 283 U.S. 520, 51 Sup. Ct. 501, 75 L. Ed. 1243; *Schendel v. Bradford*, 106 Ohio St. 387, 394, 140 N.E. 155. The remedy is a new trial." (Emphasis supplied) 61 F.2d at 198.

As Judge Rives concluded:

"... it seems to me that 'public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice.' *N.Y. Central R.R. Co. v. Johnson*, 1929, 279 U.S. 310, 318. That would be true even if the prejudicial argument had not been followed by a grossly excessive verdict. I submit that the \$3,000,000 punitive damage

verdict was so clearly the result of passion and prejudice that it could not be cured by remittitur.

[fol. 1718] Even if the majority were correct in attributing the unprecedented \$3,000,000 punitive damage verdict to some other cause, it is, nevertheless, clear that the attempt of the trial court to arbitrarily fix damages at \$400,000, without any semblance of a standard to guide it, constitutes a direct invasion of the defendant's right to trial by a fair and impartial jury on the issue of damages which is guaranteed by the Seventh Amendment. As the Supreme Court has said, such a "calculation . . . can be little better than speculation as to the extent of the wrong inflicted upon [the defendant]" *Minneapolis, St. P. & S.S. M. Ry. Co. v. Moquin*, 283 U.S. 520, 521-22, 51 Sup. Ct. 501, 75 L.Ed. 1243 (1931). This fact was emphasized by Judge Rives:

"It is difficult in any case to reconcile the practice of remittitur with the constitutional right of a defendant to trial by jury. The logic of Professor Carlin's article on Remittiturs and Additurs (1942), 49 W.Va. LQ 1, 17, 18, quoted in 6 Moore F.P. (2d ed.) 3738-39, seems to me unanswerable.

"That logic is peculiarly applicable to the circumstances of this case, where only punitive damages are reduced and there is no rule or standard by which the judge can separate any good part of the verdict from the bad. In effect, the remittitur from \$3,000,000 to \$400,000 represents nothing more specific than the difference between the jury's and the judge's sense of 'ethical indignation.' The jury's verdict cannot be recognized in the final judgment."

It is, of course, no answer to suggest that to grant a [fol. 1719] new trial on grounds of gross excessiveness will result in a second trial at which the question may again be presented. As Judge Rives said:

"The seventh amendment guarantees a right of trial by jury to the defendant as well as to the plaintiff. I cannot escape the conviction that by the remittitur in this case that right has been denied to the defendant.

"Both because *New York Times v. Sullivan* is convincing that this case was tried upon fundamentally erroneous principles of law, and because the enormous award of punitive damages and the remittitur violate the defendant's constitutional rights, I would reverse the judgment of the district court. I therefore respectfully dissent."

III

The Majority Has Sanctioned an Excessive Verdict—the Product of Erroneous Trial Rulings and Impassioned Pleas Which Effectively Prevented Defendant From Presenting Its Defense of Truth and Good Faith Position to the Jury.

Throughout the entire trial the Court entered vital rulings against the defendant and allowed Butts' counsel to inflame the jury, all to the prejudice of Curtis and its right to a fair trial on the merits. The detrimental effect upon Curtis' case is apparent when the central [fol. 1720] issue in the case and the parties' contentions in regard thereto are analyzed.

The defendant's liability centered upon the question of whether Butts gave Bryant information about the Georgia football team which could have affected the outcome of the Georgia-Alabama game. George Burnett, the defendant's principal witness, testified that he overheard a telephone conversation between Butts and Bryant during which Butts gave Bryant significant information concerning the Georgia team, and that Butts was going to give further information to Bryant in a telephone conversation to take place a few days later. Records of the telephone company established that these two telephone conversations actually took place.

Although Butts did not deny that the telephone calls took place, he did profess to be unable to recall the nature and substance of them. He even testified that on being shown Burnett's notes he stated that "such a telephone call might have been overheard." (R. 634). His only hope then of successfully negating the Burnett evidence that he gave improper information to Bryant was to convince the jury that he did not do such a thing because of his loyalty and devotion to the University of Georgia. This defense or theme was developed and emphasized throughout the trial by Butts' own testimony,⁷ by his own witnesses,⁸

⁷ "Q. Coach Butts, hasn't the University of Georgia been pretty good to you over the years?

"A. Yes, sir; they have given me a wonderful opportunity, and I appreciate it very much, and I might add, I will always be loyal to the University of Georgia, regardless." (R. 685-6).

"Q. Coach Butts, do you recall a statement that you made over television on March the 29th, 1963, as follows:

"Gentlemen, I came over here today to see the Attorney General of the State of Georgia, Mr. Gene Cook. My express purpose was to check with him things that I had read in the papers and heard on T.V., that in some respects might imply that I had at some time or another been connected with gambling interests. I assured Mr. Cook that I never had been interested in gambling. I have never been interested in associating with people that were known gamblers, and that I would like to repeat that what I have said many times before. My greatest love of all and interest is in the University of Georgia, and I would never at any time and never have done anything that would injure the University of Georgia, and that is all I have to say."

"Did you make that statement?

"A. Mr. Cody, I have heard so many statements, and been around you lawyers so much, might be a few words out of line there, but I made a statement to that effect. I would like to say that as far as my services at the University of Georgia are concerned, that represents only my opinion." (R. 692).

As this latter statement was made a mere four days after suit was filed, it shows the early point at which Butts and his counsel conceived their defense.

⁸ When John Carmichael, plaintiff's chief witness, was asked on direct examination about his calling Butts in Philadelphia to

[fol. 1721] by the cross examination of defendant's witness,^{*} and, as Judge Rives emphasizes, by his

inform him of Burnett's report of the Butts-Bryant telephone conversation, Carmichael stated that Butts said there was nothing to the matter because he "would never do anything to hurt Georgia." (R. 345). Carmichael's testimony was:

"Q. What conversation took place between you and [sic] Coach Butts when he called you back?

"A. Well, I didn't know whether Coach Butts would know who I was or not, at first, so I told him over the phone who I was, and I asked him if he remembered me, and he said: 'Yes, I do, John.' And so then I told the Coach what Mr. Burnett told me on the morning of September the 13th, when he received the telephone call, and I told the Coach what Mr. Burnett had told me that morning on January 30th, what he had done, and the Coach said to me, he said: 'Well, John, I appreciate your calling me, but,' he said, 'I'll tell you this,' he said: 'I am sure there is nothing to it, because I don't know whether I called Coach Bryant or not, but I will tell you this,' he said, 'I talk to a lot of coaches, and I don't remember making a call on that particular day, but if I did,' he says, 'I will assure you there was nothing to it, because I would never do anything to hurt Georgia.' And he thanked me for calling him, and it was a very short conversation. It only lasted three or four minutes at the most, and that was all there was to that conversation." (Emphasis added.) (R. 845).

Similarly, when plaintiff's witness, William Hartman, was asked on cross-examination whether Butts denied the telephone call, he volunteered:

"The only thing he denied was that he had ever done anything to hurt Georgia and he repeated that several times." (R. 998).

Seizing upon this opportunity, Butts' counsel, upon redirect examination, questioned Hartman:

"Q. He [Butts] didn't deny that [he never did anything to hurt Georgia]; he asserted it, did he not?

"A. He asserted it." (R. 999).

^{*}After defendant's witness, Dr. Aderhold, had testified that upon being shown Burnett's notes, Butts "indicated that the call was made, and that these items [in the notes] were probably discussed" (R. 1102), Butts' counsel asked Dr. Aderhold:

[fol. 1723] counsel in their closing arguments.¹⁰ It was obvious therefore, that the crucial prop for Butts' case was the proposition that he had always been loyal to and had never done anything to hurt his University.¹¹ The trial court's refusal to permit cross-examination of the plaintiff or the introduction of evidence to contradict this false

"Q. Let me put it this way. You did testify he told you and the others he would never do anything that would hurt the University of Georgia, didn't he?

"A. He said, 'I didn't do anything that I thought would hurt the University of Georgia and I never would,' or something to that effect.

"Q. All right, sir. These notes that he had there in his hand, if they contained information that might have helped an opposing coach, that would have hurt the University of Georgia, wouldn't it?

"A. Well, presumably so." (R. 1139).

Plaintiff's witness, J. D. Bolton, was similarly utilized by Butts' counsel on cross-examination to re-emphasize the same point:

"Q. Going back to the topic I was questioning you about at the beginning of this examination, I have in my hand a transcript prepared by the Court Reporter here of your testimony when you were on the stand last week. This question—I ask you if you remember this question being asked you by Mr. Cody: 'Could you recall for the Jury what comment he did make,' referring to Wallace Butts? Answer by Mr. Bolton: It got down—'It's just conversation, ordinary football talk among coaches, and that you know I would not give Old Bryant anything to help him and hurt Georgia, and I wouldn't do anything to hurt Georgia.' Do you remember giving that answer?" (R. 1160).

¹⁰ Butts' counsel completed the theme of Butts' loyalty to the University when in his emotionally charged argument to the jury which described Butts as "Mr. Georgia" (R. 1300), and concluded with:

"... they will put Wallace Butts in a red coffin with a black lid, and he will have a football in his hands, and his epitaph will read something like this: 'Glory, Glory to Old Georgia.'" (R. 1322).

¹¹ In addition, the plaintiff interjected his "integrity" into the case by his own pleading. See pages 167-68 of Appellant's principal brief.

theme of Butts' unswerving loyalty to the University was clearly error.

The evidence which the defendant offered and which was excluded would have clearly shown that Butts had committed frauds upon the University, and that he was disloyal to the public trust which the University had reposed in him. Every specific act of misconduct offered by Curtis involved a fraud upon the University of Georgia, of which Butts was Athletic Director. Certainly, a man who had charged more than \$2,800 of personal telephone calls to his University over a period of approximately sixteen months was not one who had never done anything to hurt the University. Similarly, could a man who carried on an open and notorious relationship with a woman not his wife (and charged a substantial part of the cost of that relationship to his University) be the University's loyal servant who set a fine example for his pupils? As is explained in [fol. 1724] more detail on pages 154 and 155 of Appellant's principal brief and in the Record at pages 822-840, Curtis was denied the right to cross-examine Butts in regard to many instances which would have clearly shown that his principal defense to the Post charge—that he had always been loyal to and had never done anything to harm his university—was false.

The Appellant was also denied its fair right to cross-examine Butts in regard to his deliberate false testimony upon deposition (See Point IV B of Appellant's principal brief) and as to his and his counsel's policy of evasiveness and concealment by Butts' refusal to answer relevant questions on deposition (See Point IV E of Appellant's principal brief). These prejudicial effects were multiplied when Butts' counsel was allowed to "testify" in closing argument as to his good character and truthfulness (R. 1289, 1321) and imply that other witnesses had similarly testified (R. 1290, 1305,¹² 1309.¹³)

¹² "Seated there with him throughout for two weeks has been his lovely wife, Winnie and his three daughters. That is a glowing

Defendant was similarly prevented from attacking the credibility of plaintiff's principal witness, John Carmichael, in regard to his prior convictions and his propensity to give false statements to public officials (Point IV F of Appellant's principal brief). Butts' counsel subsequently stated that it made little difference whether John Carmichael had previously been convicted of crimes and [fol. 1725] given false statements in evaluating his credibility, but at the same time they claimed that the Post officials should not have believed George Burnett, whom they termed a "hot check artist" (Br. 7) and a "man who is always one step ahead of the Sheriff" (R. 1297), because he had been arrested for passing two bad checks. Similarly, the majority infers that Burnett, "who was known by Curtis to have been convicted of writing bad checks, and to be on probation at the time he claimed to have listened in on the conversation," was not trustworthy.¹⁴ It was, of course, Carmichael who directly contradicted Burnett's testimony in several crucial respects. See Appellant's principal brief at pp. 189-90.

The trial court's totally unjustified refusal upon hearsay grounds to allow Burnett to testify in regard to vital checkpoints in his story bore directly upon the liability as well as the punitive damage aspects of the case.

tribute, as glowing a tribute as were those four boys coming over here, and the trainer, Sam Richwine, and Charlie Trippi and John Gregory coming over here and showing you what they thought of Wallace Butts."

¹³ "Sam Richwine, old Sam, I had never seen him before; he is a trainer over there; he is still working there and in the face of Dr. Aderhold and Bolton. He came over here and stood up and was counted for Wallace Butts."

¹⁴ The majority upheld the exclusion of Carmichael's prior convictions upon a "lapse of time" theory, which is directly contrary to Georgia law. *Woodward v. State*, 197 Ga. 60, 28 S.E.2d 480 (1943) ("the fact that the conviction of the crime took place twenty years previously, would not affect the admissibility of the evidence"); *Daggett v. Sims*, 79 Ga. 253, 4 S.E. 909 (1888). See Appellant's principal brief pages 184-86.

The fact that Burnett took the time and trouble to call back the operator to ascertain that he was connected with the Athletic Department at the University of Alabama and to call Milton Flack to establish for himself that Wallace Butts was in Flack's office shows that Burnett was amazed by the telephone conversation between Butts and Bryant which he had just overheard and desired to check upon it. If Burnett had merely overheard a telephone conversation between these two individuals relating to "rules" or "tickets" he would have probably hung up in the middle of it, or at least not have been concerned enough to double [fol. 1726] check its authenticity. These extrajudicial statements by Burnett could not by any stretch of the law be hearsay, and his report of statements made by the operator and by Flack were not introduced for the truth of the matter asserted, but merely to show that the statements were made. Whether or not the operator and Flack told the truth is unimportant, but the fact that Burnett received such information from them is important to the jurors who had to evaluate his credibility and the Post officials' reasonableness and good faith in believing Burnett. Even though the majority recognized that the trial court should have admitted this evidence because it was "important from Curtis' standpoint that it show its good faith in publishing the article," it in the same breath dismissed the point with the comment of "nominal error."

Instructions given by the trial court to the jury not only protected the plaintiff and his witnesses again and again, but practically amounted to a directed verdict for Butts. Although the defendant specifically requested an instruction to the effect that if Butts' testimony was contradictory, vague or equivocal, it must be construed most strongly against him and subsequently objected to the court's failure to give such charge, the trial court cavalierly dismissed defendant's objection with the statement that it believed it had given the charge in different wording. (R. 1368). A review of the entire charge discloses no language bearing any similarity to the request. See Point VII of Ap-

pellant's principal brief. In this same context, defendant requested the well-recognized and proper instruction that the jury must disregard the entire testimony of any witness whom it finds to have knowingly and wilfully testified falsely. Although the defendant entered proper objection [fol. 1727] at the conclusion of the court's charge in this regard, the court refused to recharge the jury properly (R. 1367-68). See Point VIII of Appellant's principal brief. Even though the plaintiff's reputation was the basis for the recovery of the general damages he sought, and the defendant introduced the testimony of six members of the University's Athletic Board, including the President of the University, that plaintiff's reputation was bad and that they would not believe him under oath, the trial court, in spite of the fact that the plaintiff offered no evidence of his good reputation, instructed the jury that the plaintiff was presumed to have a good reputation and was "entitled to reply upon his presumption of good reputation." (R. 1355). See Point VI E of Appellant's principal brief. The authorities there cited clearly disclose the rule that in such a situation the presumption vanishes.

The trial court practically directed a verdict for Butts when it informed the jury, not only improperly, but needlessly, that the Post article was "libelous per se" (R. 1348, 1353). This, from a layman's standpoint, left in the jurors' minds only the question of "how much" the damages should be. See Point I B of Appellant's principal brief and Point VII of Appellant's reply brief. The authorities there cited clearly disclose that in a libel action it is never proper (except when a crime is charged; if then) to instruct the jury that a publication is libelous per se. The effect of such a charge in the present case was to instruct the jury that the plaintiff was in the coaching profession at the time of the publication, that he was injured therein, that the publication was false, and that there was malice. Certainly if the meaning of such a charge could be so construed by the jury (even though it could reasonably be construed [fol. 1728] otherwise), it was erroneous, and because it in-

volved a crucial point in the case, it constituted reversible error. This was another part of the charge to which counsel for the defendant entered a proper objection (R. 1366).

Finally, the court allowed the case to go to the jurors with Butts' counsel's ringing improper arguments in their ears. Not only were counsel allowed to testify as to Butts' good character, truth and veracity, and state that others had similarly done so, but they were allowed to inject improper measures of damages into the case (the Post received a "hundred million dollars in advertising, would ten percent of that be fair to Wallace Butts for what they have done to him?" (R. 1321), and "You could return a verdict for Wally Butts in this case of ten million dollars, and it would be the greatest merchandising bargain the Saturday Evening Post ever got" (R. 1296), and if "you let them out of this case for five million dollars or less, and boy, it's been worth it to them" (R. 1319), as well as incorrect standards for the imposition of punitive damages ("We have got to stop them now, and you are the only twelve in the world that can stop them" (R. 1319), and "I may be next . . . You may be next; my wife; my children; yourself" (R. 1319), and "There are just thousands and thousands of people who are mad about it" (R. 1297).¹⁵

On the inflammatory side, as Judge Rives noted, counsel were allowed to introduce such prejudicial remarks as "they kill him, his wife, his three lovely daughters. What do they care? They have got money; getting money for it" (R. 1319); "I think it would teach them that we don't have that kind of journalism down here, and [fol. 1729] we don't want it down here, and we don't want it to spread from 666 Fifth Avenue any further than that building right now" (R. 1321); and "Somebody has got to stop them. There is no law against it, and the only way that type of . . . yellow journalism can be stopped

¹⁵ Counsel were aided in having the jury utilize incorrect standards for punitive damages by the court's erroneous instructions. See Points IV, A, B and C of Appellant's principal brief.

is to let the Saturday Evening Post know that it is not going to get away with it." (R. 1319). See Point III of Appellant's principal brief.

Thus, the above, as well as the other prejudicial errors which are discussed in detail in Appellant's principal brief, certainly could cause the jury to return a verdict against Curtis upon the question of liability as well as for punitive damages in an outrageous amount. The trial judge clearly recognized this to be the fact, as he held the verdict to be "grossly excessive." He sought to cure these errors then by granting a new trial unless the plaintiff remitted all punitive damages in excess of \$400,000. The fatal error in the trial court's action in this regard is that the errors committed during the trial cannot be corrected by a mere remittitur. These errors, as is shown above and in Appellant's other briefs, went to the question of liability in this case and, more specifically, whether the jurors believed George Burnett or Wallace Butts and John Carmichael, and the halo which Butts erected to protect his case, as well as to stimulate and inflate punitive damages. These series of circumstances prevented defendant from effectively presenting its defense of truth and its good faith position to the jury.

Respectfully submitted,

Welborn B. Cody, Harold E. Abrams, Emmet J.
Bondurant, Thomas E. Joiner.

[fol. 1731] Of Counsel:

Kilpatrick, Cody, Rogers, McClatchey, & Regenstein, 1045
Hurt Building, Atlanta, Georgia 30303.

Philip H. Strubing.

Of Counsel:

Pepper, Hamilton & Scheetz, Fidelity-Philadelphia Trust
Bldg., Philadelphia, Pa. 19109.

Attorneys for Appellant.

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 1732]

State of Pennsylvania
County of Philadelphia

AFFIDAVIT

Personally appeared before the undersigned officer duly authorized to administer oaths, Philip H. Strubing, who, having been duly sworn, deposes on oath and says as follows:

I am a member of the Philadelphia, Pennsylvania law firm of Pepper, Hamilton & Scheetz, general counsel for Curtis Publishing Company. I have read the opinion of the United States Court of Appeals for the Fifth Circuit in the case of *Curtis Publishing Company v. Wallace Butts*, No. 21491, dated July 16, 1965, and am making this affidavit because of the following erroneous factual statements and conclusions in the majority's opinion:

"While it is true that the Supreme Court did not decide the *Times* case until March 9, 1964, it would be contrary to reason and common sense to assume that there had not been, at all times during the pendency of this case, full communication among Curtis' counsel, particularly concerning trial strategy. The facts more than justify our conclusion that Curtis was fully aware when this suit was instituted, and certainly no later than the beginning of trial, that the constitutional questions it now argues had been for some time, and were still being, vigorously asserted in *Times*."

As general counsel for Curtis Publishing Company, I participated actively with Mr. Welborn B. Cody and other attorneys in the Atlanta law firm of Kilpatrick, Cody, Rogers, McClatchey & Regenstein in the preparation of this case for trial. Later, I also worked actively with Mr. [fol. 1733] T. Eric Embry of the Birmingham law firm of Beddow, Embry & Beddow in the preparation of the case of *Paul Bryant v. Curtis Publishing Company* in the United

States District Court for the Northern District of Alabama. Mr. Embry and Mr. Roderick Beddow, Jr. attended the trial of the *Butts v. Curtis* case in Atlanta, but only as spectators. They were not consulted concerning the trial strategy of the *Butts* case. Since the *Bryant v. Curtis* case was to be tried some months after the *Butts v. Curtis* case, we had not at that time commenced active preparation of the *Bryant* case. There were no discussions between Messrs. Embry and Beddow and me in regard to the constitutional questions being alleged by the New York Times Company in the case of *New York Times Company v. Sullivan*, 376 U.S. 254, 84 Sup. Ct. 710, 11 L. Ed. 2d 686 (1964), and there was no suggestion by these attorneys that any constitutional issues be raised in the *Butts v. Curtis* case. Furthermore, the constitutional questions "vigorously asserted in *Times*" were not those which Curtis now argues. I certainly did not intend to waive any constitutional defense of Curtis in the *Butts v. Curtis* case, and was not aware of the constitutional defense provided by *New York Times Company v. Sullivan* until that case was decided by the Supreme Court on March 9, 1964, some six months after the trial of the *Butts* case.

Philip H. Strubing.

Sworn to and subscribed before me, this 2nd day of August, 1965.

John S. Raum, Notary Public.

[fol. 1734]

State of Alabama
County of Jefferson

AFFIDAVIT

Personally appeared before the undersigned officer authorized to administer oaths, T. Eric Embry, who, having been duly sworn, deposes on oath and says as follows:

I am a partner in the Birmingham, Alabama law firm of Beddow, Embry & Beddow. I have read the opinion

of the United States Court of Appeals for the Fifth Circuit in the case of *Curtis Publishing Company v. Wallace Butts*, No. 21491, dated July 16, 1965, and am making this affidavit because of the following erroneous factual statements and conclusions in the opinion of the majority:

"While it is true that the Supreme Court did not decide the *Times* case until March 9, 1964, it would be contrary to reason and common sense to assume that there had not been, at all times during the pendency of this case, full communication among Curtis' counsel, particularly concerning trial strategy. The facts more than justify our conclusion that Curtis was fully aware when this suit was instituted, and certainly no later than the beginning of trial, that the constitutional questions it now argues had been for some time, and were still being, vigorously asserted in *Times*."

My firm represented the New York Times Company in [fol. 1735] the case brought against it by L. B. Sullivan (*New York Times Company v. Sullivan*, 376 U.S. 254, 84 Sup. Ct. 710, 11 L. Ed. 2d 686 (1964)) and Curtis Publishing Company in the libel cases brought by Paul Bryant in the United States District Court in Birmingham. I was the member of my firm who handled the representation of these clients in all of these cases. Although Roderick Beddow, Jr. performed some services in the *Bryant v. Curtis* case, primarily during my illness in 1963, neither Roderick Beddow, Jr. nor Roderick Beddow, Sr. had any part in the *New York Times* litigation, as Roderick M. MacLeod and I were the only attorneys in our firm who worked on this case. Roderick Beddow, Jr. and I did attend the trial of the *Butts v. Curtis* case in Atlanta. However, we did so only as spectators to prepare ourselves for the trial of the *Bryant v. Curtis* case which was to be held at a subsequent date. At no time prior to or during the trial did we consult with Curtis' general counsel, Mr. Philip H. Strubing, or with Curtis' trial counsel, Mr. Welborn

B. Cody, or any other attorney representing Curtis in regard to trial strategy or the constitutional questions which we were urging before the United States Supreme Court in the *New York Times* case. We were not asked for our opinion concerning constitutional questions in the *Butts v. Curtis* case, and did not volunteer any opinion or suggestion to Curtis' counsel that any constitutional questions be raised in the *Butts* case.

Our principal contentions in the petition for writ of certiorari to the Supreme Court of the United States in the *New York Times* case were (1) that the New York Times Company was not doing business in Alabama, and (2) that since the statements which Times printed referred [fol. 1736] to no individual by name, but simply criticized the Montgomery Police Department which was under the direction of Mr. Sullivan, an elected City Commissioner, such statements could not be considered libelous without violating freedom of the press guaranteed by the First and Fourteenth Amendments. The requirement of the *New York Times* case that general damages could not be awarded without the necessity of proof of actual malice on the part of the defendant was not specifically presented in the Alabama courts nor in the petition for certiorari to the United States Supreme Court.

T. Eric Embry.

Sworn to and subscribed before me, this 30th day of July, 1965.

Mary B. Weatherly, Notary Public.

[fol. 1737]

State of Georgia
County of Fulton

AFFIDAVIT

Personally appeared before the undersigned officer authorized to administer oaths, Welborn B. Cody, who, having been duly sworn, deposes on oath and says as follows:

I am a partner in the Atlanta, Georgia law firm of Kilpatrick, Cody, Rogers, McClatchey & Regenstein. I have represented Curtis Publishing Company in the case of *Curtis Publishing Company v. Wallace Butts* since that case was filed in the United States District Court for the Northern District of Georgia. I have read the opinion of the United States Court of Appeals for the Fifth Circuit in this case (No. 21491) and am making this affidavit because of the following erroneous factual statements and conclusions in the majority's opinion:

"While it is true that the Supreme Court did not decide the *Times* case until March 9, 1964, it would be contrary to reason and common sense to assume that there had not been, at all times during the pendency of this case, full communication among Curtis' counsel, particularly concerning trial strategy. The facts more than justify our conclusion that Curtis was fully aware when this suit was instituted, and certainly no later than the beginning of trial, that the constitutional questions it now argues had been for some time, and were still being, vigorously asserted in *Times*."

[fol. 1738] At no time during the preparation or trial of this case did I consult with Mr. Roderick Beddow or Mr. T. Eric Embry, or any member of the law firm of Beddow, Embry & Beddow, in regard to the constitutional questions being raised in the case of *New York Times Company v. Sullivan*, 376 U.S. 254, 84 Sup. Ct. 710, 11 L. Ed. 2d 686 (1964), nor was I informed of the constitutional issues raised in that case. My only conversations and communications with members of that law firm pertained to factual questions and the taking of depositions in Alabama. Although Mr. T. Eric Embry and Mr. Roderick Beddow, Jr. attended the trial of the *Butts v. Curtis* case in Atlanta, they did so merely as spectators, and not as a part of the trial team in that case, and were not consulted with respect to the trial strategy of the case.

I did not read the petition for writ of certiorari filed by the New York Times in the United States Supreme Court at any time prior to or during the trial of *Butts v. Curtis* and was not aware of the constitutional issues being urged in that case. I certainly did not intend to waive any constitutional rights Curtis Publishing Company may have had in its defense of *Butts v. Curtis*.

Welborn B. Cody.

Sworn to and subscribed before me this 2nd day of August, 1965.

Julia H. Wooten, Notary Public.

[fol. 1739]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21,491

[Title omitted]

RESPONSE TO PETITION FOR REHEARING EN BANC—Filed
August 23, 1965

[fol. 1740] Comes now Wallace Butts, Appellee, and submits this response to the Petition for Rehearing En Banc heretofore filed by Curtis Publishing Company, Appellant.

1.

In Ground 1 of its petition Curtis contends that the majority of the panel of this Court erred in finding that Curtis waived its right to raise the constitutional defense that plaintiff's action was barred by the First Amendment.

Appellee specifically denies this contention and, in his supporting brief, will demonstrate beyond any doubt that Curtis was fully aware of the existence of and its right to

[File endorsement omitted]

plead the First Amendment as a defense to this libel action and of its obligation to plead it timely if it wished to [fol. 1741] preserve the point on appeal. This is conclusively demonstrated by the fact that Curtis affirmatively raised the First Amendment defense in pleadings filed by it in the trial court in the libel cases of *Bryant v. Curtis Publishing Company* pending in the United States District Court, Birmingham, Alabama, in which cases it was represented by the same general counsel who participated so actively in the instant case and whose firm, Pepper, Hamilton & Scheetz, signed those pleadings in *Bryant*. (See subparagraphs 3(f) and 3(h) of Exhibit "A" and subparagraphs 2(f) and 2(h) of Exhibit "B" attached hereto, each of which is by reference incorporated herein and made a part hereof.) In view of Curtis' latest (and really quite sophomoric) argument that it had no earthly idea "libelous utterances are within the area of constitutionally protected speech" when the *Butts* case was tried, it should be of more than passing interest to note that Curtis, through its same general counsel, first asserted this constitutional defense in *Bryant* on February 26, 1963, which was *one month* before suit was even filed in the *Butts* case. Curtis asserted this First Amendment defense in the second *Bryant* libel suit less than three weeks after it filed its defenses in *Butts* and more than three months prior to trial.

Furthermore, as found by the majority, these same constitutional grounds were raised in the *Times v. Sullivan* case by Curtis' local counsel in *Bryant* long before the petition in *Butts* was even filed. (Dec. P. 12) As the majority stated:

"The facts more than justify our conclusion that Curtis was fully aware when this suit was instituted, and certainly no later than the beginning of trial, that the constitutional questions it now argues had been for some time, and were still being, vigorously asserted in *Times*." (Dec. P. 13)

[fol. 1742] For some reason known only by Curtis, it did not avail itself of the right to raise this issue in the instant case but, instead, and notwithstanding its knowledge that both the *Bryant* and the *Butts* cases were practically identical, intentionally and deliberately concluded to allow the *Butts* case to go to verdict and judgment without raising this constitutional question.

The truth of the matter is that Curtis was so determined to defend the *Butts* case on its plea of justification (thereby admitting a prima facie case) and thereby getting the right to open and conclude the arguments, that Curtis elected to and did waive all other defenses available to it including the constitutional grounds, the Georgia statutory privilege of commenting "upon the acts of public men in their public capacity and with reference thereto" (Ga. Code Ann., Section 105-709(6)), lack of jurisdiction, and numerous other affirmative defenses, all of which it raised in *Bryant*. If Curtis' determination to try this case on its plea of justification wasn't behind all this, then what explanation could there possibly be for what the majority found to be so significant when it said:

"Curtis chose not to use as a witness either the author of the article or any of its editors who had made contributions to the article after it had been submitted. Nor did it use the Atlanta sports editor who had assisted in the preparation of the story. As one of its principal witnesses it called upon George Burnett, who was known by Curtis to have been convicted of writing bad checks, and to be on probation at the time he [fol. 1743] claimed to have listened in on the conversation." (Dec. P. 4-5)

Indeed, if Curtis wasn't so positive as to its theory as to how to try this case that it didn't want to clutter up the pleadings by raising the additional affirmative defenses, including the First Amendment, which it raised in *Bryant* (where it wasn't so determined—in fact, so leery of victory

was Curtis in Alabama that it paid that plaintiff \$300,000 (R. 1456) not to go to trial), how can one account for the following curious conduct by Curtis as described by the majority:

"If, as Curtis' counsel now claim, the arguments were, among other things, 'grossly improper and inflammatory', 'intemperate and inexcusable', 'appeals to passion and prejudice', 'corruptions of the evidence', 'completely unsupported by the evidence'; and 'unsworn testimony of counsel', it is *inconceivable* to us that they would have delayed so long without raising the slightest hint of an objection. Leeway must often be allowed counsel in objecting to argument lest the objection itself magnify the harm. But to say nothing during argument, the extended week end recess, and for nine days thereafter, leaves us with the conviction that they did not consider the argument objectionable at the time they were delivered, *but made their claim as an afterthought.*" (Dec. P. 20) (Emphasis added)

[fol. 1744] Curtis also contends in Ground 1 of its petition that "the *Times* decision for the first time extended the protection of the First Amendment to libel." Appellee specifically denies this. In the body of its decision the Supreme Court points out that the rule prohibiting a public official from recovering damages in a libel action unless he proves actual malice "had been adopted by the highest courts of numerous states" and "is supported by the consensus of scholarly opinion." *Times v. Sullivan*, 11 L. Ed. 2d. 686 at 706-707. As a matter of fact, the decision quoted with approval by the Supreme Court was decided in 1908 (see 11 L. Ed. 2d. 707).

2.

In this ground of its petition Curtis contends that Judge Spears, being a District Court Judge, a rehearing *en banc*

should be granted in order that uniformity in the decisions of this Court may be insured. Appellee specifically denies this contention and shows that:

(1) In this contention Curtis is again back at its old habit in this case of waiting until after the verdict and judgment is rendered against it to make objections or allege constitutional errors. This case was argued before this Court on October 8, 1964, and Judge Spears was sitting as a member of the panel. Mr. Philip H. Strubing, General Counsel of Curtis and Welborn Cody and various other trial counsel of Curtis were present and participated in the argument before this Court on October 8th. They made no objection then to the case being argued before Judge Spears although surely they knew he was a District Court Judge. Apparently being willing to take their chances with [fol. 1745] Judge Spears they submitted their case to the panel. The case was under consideration by Judges Spears, Brown and Rives from October 8, 1964 to July 16, 1965, when a decision was rendered and during that time, over nine months, Curtis raised no objection to its appeal being ruled on by Judge Spears. Now that Judge Spears is one of the majority of the Court that decided the case against it, Curtis in effect claims error and wants a hearing by a court composed only of active Circuit Court of Appeals Judges and all of them at that. As said by the majority in its decision, page 32:

"We think that Curtis has had its day in court. It apparently thought so too until the jury verdict was returned. This is attested by the fact that practically all of its present complaints were not even raised until after the trial."

(2) To contend now that the mere fact that the majority included a properly designated and impanelled district judge requires a rehearing *en banc* would mean that in every appeal considered by any panel of this Court consisting of a district judge would require a rehearing *en*

banc if a decision was a split decision with one of the circuit judges dissenting. It is shocking indeed for Curtis to be so intemperate as to suggest that Judge Spears' participation in the decision affords any basis whatsoever for a rehearing.

(3) *Wisniewski v. United States*, 353 U.S. 901 cited by Curtis for the proposition that uniformity in the decisions of this Court requires a rehearing *en banc* is inapplicable since the court in that case was dealing with two separate [fol. 1746] panels of the Court of Appeals as distinguished from this case where Curtis is complaining about two judges on one panel. The uniformity of decisions discussed in *Wisniewski* quite apparently is uniformity among the panels of the Court and not the judges of one panel of that Court.

3.

Under this ground of its petition Curtis contends that the applicability of the "new" First Amendment principles of *Times* is a question "of major importance which has been expressly left by the Supreme Court to be decided by the lower federal courts in the first instance . . ." In response to this ground, Appellee asserts that (1) *Times*, as heretofore pointed out, did not for the first time extend the protection of the First Amendment to libel; and (2) the contention in this ground would presuppose Curtis had timely raised the defense of the First Amendment as it well knew it had the right and obligation to do in order to preserve same and not wait until after verdict and judgment.

4.

In this ground Curtis contends that the "affirmance of the unprecedented and excessive award of punitive damages" is in violation of its constitutional rights and then sets forth two arguments in support thereof. Appellee specifically denies the contentions set forth in this ground and as will be more fully hereinafter developed in his sup-

porting brief, Appellee points out that (1) the same points were raised in the application for writ of certiorari in [fol. 1747] *Aware, Inc. v. Faulk*, 202 N.E. 2d. 372, cert. den. 380 U.S. 916, 13 L. Ed. 2d. 801 (1965), recently filed and summarily denied by the United States Supreme Court wherein a jury award of three and one-half million dollars had been reduced by the state court on remittitur to \$550,000; and (2) this same Curtis Publishing Company paid Paul Bryant \$300,000 (R. 1456) to settle his companion libel suit in Alabama growing out of the same article, with no claim that it amounted "to a penal sanction."

5.

In this ground Curtis contends that "the Court incorrectly allowed an excessive jury verdict, which was the product of erroneous trial rulings and instructions, as well as passion and prejudice; to stand." This contention is specifically denied and, as will be more fully developed in his supporting brief, Appellee shows that once again Curtis failed, as it did time and time again throughout the trial, to interpose objections to the matters now complained of as it was required to do under FRCP 51.

Wherefore, Appellee prays that the petition be denied.

Respectfully submitted,

William H. Schroder, Allen E. Lockerman, Robert
L. Pennington, Milton A. Carlton, Jr., Gerald P.
Thurmond, Attorneys for Wallace Butts, Ap-
pellee.

Of Counsel:

Troutman, Sams, Schroder & Lockerman, 1600 William-
Oliver Building, Atlanta, Georgia 30303.

[fol. 1747a] CERTIFICATE OF SERVICE (omitted in printing).

[fol. 1748]

~~EXHIBIT "A"~~ TO RESPONSE TO PETITION FOR REHEARING

[Stamp—Filed in Clerk's Office, Northern District of Alabama—Feb 26 1963—William E. Davis, Clerk, U. S. District Court, By Jewel M. Massey, Deputy Clerk.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION
Civil Action No. 63-2-W

PAUL BRYANT,

Plaintiff,

vs.

THE CURTIS PUBLISHING COMPANY, A Corporation,
and FURMAN BISHER,

Defendants.

MOTION OF DEFENDANT, THE CURTIS PUBLISHING COMPANY,
A Corporation, TO DISMISS

Comes the defendant, The Curtis Publishing Company,
a Corporation, and moves the Court as follows:

1. To dismiss this action because the complaint fails to state a claim against this defendant upon which relief can be granted.
2. To dismiss the action inasmuch as the same is brought improperly in the Western Division of the Northern District of Alabama.

3. To dismiss this action because the complaint fails to state a claim against this defendant upon which relief can be granted in the following particulars, separately and severally:

(a) For that the magazine article complained of is not libelous as a matter of law.

(b) The magazine article complained of is not libelous per se and there is no allegation of special damages.

(c) Part of the magazine article complained of and relied upon as libelous is not of and concerning the plaintiff.

(d) Part of the magazine article complained of and relied upon as libelous is alleged out of the context of the entire magazine article which is not libelous as a matter of law.

(e) To subject this defendant to liability in the circumstances complained of would impose an unreasonable burden upon interstate commerce in violation of Article 1, Section 8 of the Constitution of the United States.

[fol. 1749] (f) To subject this defendant to liability in the circumstances complained of would abridge the freedom of speech and of press in violation of the First Amendment to the Constitution of the United States, made applicable to the States by the Fourteenth Amendment to the Constitution of the United States.

(g) To subject this defendant to liability in the circumstances complained of would be repugnant to Article 1, Section 6 of the Constitution of the State of Alabama in denying to this defendant due process of law.

(h) To subject this defendant to liability in the circumstances complained of would be repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

(i) The magazine article complained of is not libelous as a matter of law in that it is fair comment concerning a

personality who is famous throughout the United States and abroad.

PEPPER, HAMILTON & SCHEETZ
BEDDOW, EMBRY & BEDDOW

By /s/ T. ERIC EMBRY
T. Eric Embry, Attorneys for The Curtis
Publishing Company, A Corporation

[fol. 1750]

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing Motion on Messrs. Pritchard, McCall and Jones, Attorneys for Plaintiff in this cause, by mailing a copy of same to them at their office at the Frank Nelson Building, Birmingham, Alabama, United States postage prepaid.

This 26th day of February, 1963.

/s/ T. ERIC EMBRY
Of Counsel

[Stamp—A True Copy—William E. Davis, Clerk, U. S. District Court, Northern District of Alabama, By M. Claire Parsons, Deputy Clerk.]

[fol. 1751]

[Stamp—Filed in Clerk's Office, Northern District of Alabama—Apr 30 1963—William E. Davis, Clerk, U. S. District Court, By (Signature Illegible), Deputy Clerk.]

EXHIBIT "B" TO RESPONSE TO PETITION FOR REHEARING

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION
Civil Action No. 63-166

PAUL BRYANT,

Plaintiff,

vs.

THE CURTIS PUBLISHING COMPANY, A Corporation,

Defendant.

MOTION OF DEFENDANT, THE CURTIS PUBLISHING COMPANY,
A Corporation, TO DISMISS

Comes the defendant, The Curtis Publishing Company, a corporation, and moves the Court as follows:

1. To dismiss this action because the complaint fails to state a claim against this defendant upon which relief can be granted.
2. To dismiss this action because the complaint fails to state a claim against this defendant upon which relief can be granted in the following particulars, separately and severally:

(a) For that the magazine article complained of is not libelous as a matter of law.

(b) The magazine article complained of is not libelous per se and there is no allegation of special damages.

(c) Part of the magazine article complained of and relied upon as libelous is not of and concerning the plaintiff.

(d) Part of the magazine article complained of and relied upon as libelous is alleged out of the context of the entire magazine article which is not libelous as a matter of law.

(e) To subject this defendant to liability in the circumstances complained of would impose an unreasonable burden upon interstate commerce in violation of Article 1, Section 8 of the Constitution of the United States.

[fol. 1752] (f) To subject this defendant to liability in the circumstances complained of would abridge the freedom of speech and of press in violation of the First Amendment to the Constitution of the United States, made applicable to the States by the Fourteenth Amendment to the Constitution of the United States.

(g) To subject this defendant to liability in the circumstances complained of would be repugnant to Article 1, Section 6 of the Constitution of the State of Alabama in denying to this defendant due process of law.

(h) To subject this defendant to liability in the circumstances complained of would be repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

(i) The magazine article complained of is not libelous as a matter of law in that it is fair comment concerning a personality who is famous throughout the United States and abroad.

PEPPER, HAMILTON & SCHEETZ
BEDDOW, EMBRY & BEDDOW

By /s/ T. ERIC EMBRY
T. Eric Embry, Attorneys for The Curtis
Publishing Company, A Corporation

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing Motion on Messrs. Pritchard, McCall and Jones, Attorneys for Plaintiff in this cause, by mailing a copy of same to them at their office at the Frank Nelson Building, Birmingham, Alabama, United States postage prepaid.

This the 30th day of April, 1963.

/s/ T. ERIC EMBRY
Of Counsel

[Stamp—A True Copy—William E. Davis, Clerk, U. S. District Court, Northern District of Alabama, By M. Claire Parsons, Deputy Clerk.]

[fol. 1753]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21,491

[Title omitted]

BRIEF IN SUPPORT OF APPELLEE'S RESPONSE TO PETITION
FOR REHEARING EN BANC

[fol. 1757]

I.

Curtis' Defenses of the First and Fourteenth Constitutional Amendments as Made by It in the Companion Libel Cases of Paul Bryant v. Curtis Publishing Company and Its Failure to Raise Those Defenses in This Case Shows a Clear Intent to Waive Them.

Under Point I of its brief, Curtis complains of the "refusal of the majority to consider the fundamental constitutional issues presented under the First and Fourteenth Amendments on the basis of the subsequent decision of the

Supreme Court in the *New York Times Co. v. Sullivan* because of the alleged waiver of these basic rights by the [fol. 1758] defendant." Curtis then argues that *Times* "radically changed the substantive law previously applicable to libel cases."

In its brief (P. 5) Curtis asserts "the majority seeks to attribute knowledge of the unannounced constitutional principles of the *Times* case to Curtis based upon its interlocking battery of counsel, . . ." and then proceeds to state in the footnote on this page that "... the majority has concluded from unsupported statements in Butts' brief, which for the most part are not true, that there was 'full communication among Curtis' counsel' in regard to the possible applicable constitutional decision in the *Times* case, which led to Curtis' intentional relinquishment or abandonment of a known right."

Curtis, in an effort to circumvent this fatal situation, has seen fit to attach to its brief affidavits of its attorneys participating in the companion cases of *Bryant* and *Butts* which were filed because of the same Saturday Evening Post article. In his said affidavit, Mr. Philip H. Strubing, Curtis' general counsel, stated on oath that he was "a member of the Philadelphia, Pennsylvania law firm of Pepper, Hamilton & Scheetz, general counsel for Curtis Publishing Company. . . As general counsel for Curtis Publishing Company, I participated actively with Mr. Welborn B. Cody and other attorneys in the Atlanta law firm of Kilpatrick, Cody, Rogers, McClatchey & Regenstein in the preparation of this case for trial. Later, I also worked actively with Mr. T. Eric Embry of the Birmingham law firm of Beddow, Embry & Beddow in the preparation of the case of *Paul Bryant v. Curtis Publishing Company* in the United States District Court for the Northern District of Alabama." Mr. Strubing further states in his affidavit that he "did not intend to waive any constitutional defense of Curtis in the *Butts v. Curtis* case."

[fol. 1759] With this affidavit before us, and comparing it with sub-paragraphs (f) and (h) of Exhibits "A" and "B"

attached to Appellee's Response to Curtis' Motion For Rehearing, let us examine just what Curtis' general counsel did by way of timely raising the First Amendment defense in the *Bryant* cases and not raising this or any other constitutional defense in the *Butts* case which was filed after Curtis' general counsel had filed pleadings in the first *Bryant* case:

On February 26, 1963 (one month before suit was filed in the *Butts* case) Curtis' general counsel, Pepper, Hamilton & Scheetz, (Mr. Strubing) signed pleadings in the case of *Paul Bryant v. The Curtis Publishing Company, et al*, Civil Action No. 63-2-W, in the United States District Court for the Northern District of Alabama (Exhibit "A" to Response), wherein Curtis moved (as a defense under Rule 12(b)6 FRCP) to dismiss a libel action instituted by Bryant because of another article appearing in its Saturday Evening Post on the grounds, among others, that:

"3(f) To subject this defendant to liability in the circumstances complained of would abridge the freedom of speech and of press in violation of the First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment to the Constitution of the United States . . .

"(h) To subject this defendant to liability in the circumstances complained of would be repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States. . ."

[fol. 1760] Thereafter, the same plaintiff, Paul Bryant, filed another suit against Curtis because of the article published in the Saturday Evening Post, which formed the basis of this suit by Butts, being Civil Action No. 63-166 in the United States District Court for the Northern District of Alabama. (Exhibit "B" to Appellee's Response) Again, in that case, Curtis' general counsel, Pepper, Hamilton & Scheetz (Mr. Strubing), signed pleadings in which it moved to dismiss the action for, among others, the reason that:

"2(f) To subject this defendant to liability in the circumstances complained of would abridge the freedom of speech and of press in violation of the First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment to the Constitution of the United States. . .

"(h) To subject this defendant to liability in the circumstances complained of would be repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States. . ."

This pleading was filed on April 30, 1963.

It might be added here that the above-quoted pleading filed for Curtis in Bryant's case No. 63-2-W was Exhibit "D" to the petition for mandamus filed in both *Bryant* cases by Curtis' general counsel (Mr. Strubing) in the United States Court of Appeals for the Fifth Circuit and was part of the record in Case No. 21,152 in that court. It was also part of the printed petition for writ of certiorari [fol. 1761] filed in January, 1964, for Curtis in the United States Supreme Court.

Thus, we have Curtis' general counsel "actively participating" with local counsel (Beddow, Embry & Beddow—T. Eric Embry) in the *Bryant* cases in Birmingham, as well as with local counsel in the *Butts* case in Atlanta. In *Bryant* Curtis' general counsel demonstrated its awareness of its right to defend against libel suits under the First Amendment by raising this defense in a timely fashion. In spite of this awareness, Curtis remained absolutely silent as to any constitutional defenses in the *Butts* case. For Curtis to argue now in its petition for rehearing that it could not have been expected to raise the First Amendment defense in *Butts* because it could not have been expected to know how *Times* would be decided is fantastic. Curtis had not needed that information in order to raise the First Amendment defense in *Bryant*. Furthermore, as found by the majority, these same constitutional grounds were raised in the *Times v. Sullivan* case by Curtis' local counsel in

Bryant long before the petition in *Butts* was even filed. (Dec. P. 12) As the majority stated:

"The facts more than justify our conclusion that Curtis was fully aware when this suit was instituted, and certainly no later than the beginning of trial, that the constitutional questions it now argues had been for some time, and were still being, vigorously asserted in *Times*." (Dec. P. 13)

• We have always thought it was horn-book law that if one wanted an appellate court to rule upon a given defense and, particularly, one based upon the violation of a defendant's constitutional rights, it was necessary to raise the issue before verdict and judgment, thereby preserving the point for decision by the appellate court.

If the First and Fourteenth Constitutional Amendments were thought by Mr. Strubing to be valid issues and grounds [fol. 1762] for dismissal of the *Bryant* cases in the United States District Court in Alabama, then why, if they did not intend to waive those grounds, did they not assert them in the *Butts* libel case growing out of the same article which was pending in the United States District Court in Georgia. For Curtis and its general counsel, Philip H. Strubing, to now claim that he "did not intend to waive any constitutional defense of Curtis in the *Butts v. Curtis* case" when he was contemporaneously asserting the First and Fourteenth Amendments as grounds for dismissal in the companion libel case of Paul Bryant in the United States District Court of Alabama growing out of the same Saturday Evening Post article, is to say the least incredible.

For Mr. Philip H. Strubing to now represent to this Court that "there was no discussion between Messrs. Embry and Beddow and me in regard to the constitutional questions being alleged by the New York Times Company in the case of *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), and there was no suggestion by these attorneys that any constitutional issues be raised

in the *Butts v. Curtis* case" we say again is most incredible. Does it stand to reason that the firm of Beddow, Embry & Beddow and Mr. T. Eric Embry of that firm who actively handled the libel case of *Sullivan v. Times* and its pleadings therein in the Alabama Courts and raised constitutional issues of the First and Fourteenth Amendments in that case *would have no discussions whatsoever* with Mr. Strubing about having raised those issues in the *Times* case when they jointly with Mr. Strubing made those same defenses in the *Bryant v. Curtis* cases?

How in the name of common sense did the issues of the First and Fourteenth Amendments get in the pleadings brought jointly by counsel for Curtis in the *Bryant v. Curtis* cases as grounds for dismissal under Rule 12(b)6, if there was no discussion by such counsel as to whether such issues should be asserted in the case?

[fol. 1763] Mr. Strubing states in his affidavit that Mr. T. Eric Embry and Mr. Roderick Beddow, Jr. of the firm of Beddow, Embry and Beddow did in fact attend the trial of the *Butts v. Curtis* case in Atlanta, "but only as spectators," that they had not commenced active preparation of the Paul Bryant case. Again we ask the question, does it stand to reason that able trial counsel from Birmingham in the cases of *Bryant v. Curtis Publishing Company* would spend two weeks in idle attendance as mere curious spectators at the *Butts v. Curtis* trial in Atlanta growing out of the same libelous article? Appellee says that the obvious answer is that Messrs. Embry and Beddow were on the payroll of Curtis Publishing Company for the two weeks they spent at the Curtis counsel table at the Butts trial in Atlanta and that such attendance was a part of active preparation for the *Bryant v. Curtis* trial soon to come up in Alabama. For Curtis to now contend that there was no discussion between its mutually interested interlocking counsel in the *Butts* and *Bryant* cases concerning questions and issues in the *Butts v. Curtis* case is most incredible. If such matters were not discussed then what was the function, responsibility and duty of joint counsel in such im-

portant litigation? Can it be believed that Messrs. Embry, Beddow and Strubing played the role of ostrich and buried their heads in the sand throughout the two weeks that Messrs. Cody, et al. tried the *Butts* case in Atlanta?

In its brief, Curtis relies upon *Hormel v. Helvering*, 312 U.S. 552 for the proposition that the majority refused to consider *Hormel* when passing upon the question of waiver. A review of *Hormel* clearly indicates the reliance is misplaced. In *Hormel*, the Commissioner of Internal Revenue [fol. 1764] had issued a tax deficiency against the taxpayer for his failure to include income from three trusts created by him in 1934, each of which was revocable at will. The Board of Tax Appeals decided the income was not taxable, however, this decision was reversed by the Circuit Court of Appeals which held the income was taxable under the subsequent decision of *Helvering v. Clifford*, 309 U.S. 331. In *Hormel* the Supreme Court held that when the Commissioner makes an express waiver of Section 22(a), as he did in *Helvering v. Wood*, 309 U.S. 334, he could not present in that Court an entirely new issue concerning the applicability of Section 22(a). *Hormel* is clearly distinguishable from our situation in that there the trusts involved were substantially identical to the trust in *Clifford*. In fact, the Supreme Court held that was no controlling distinction at all between the two cases of *Clifford* and *Hormel*. *Hormel* went on to hold that as a general rule an appellate court should confine itself to the issues properly and timely raised below and that the only exception which would be recognized was where the obvious result would be a plain miscarriage of justice.

Curtis further states that the majority's decision is in direct conflict with *Cobb v. Balkcom*, 339 F. 2d 95. This Court is well aware that *Balkcom* involved the trial of a defendant for murder in the Superior Court of Jasper County, Georgia. The question involved was whether the defendant had waived his right to challenge the composition of the jury. This Court held that it was well settled that a Negro defendant in a criminal case is entitled to an indict-

ment by grand jury and trial before a traverse jury from which Negroes have not been systematically excluded. A conviction cannot stand where such exclusion is established [fol. 1765] because it constitutes a denial of due process and the equal protection of the laws. The crux of the waiver rule as set out in *Balkcom* and in the majority of the other cases relied upon by Curtis is that the federal court in the administration of its habeas corpus jurisdiction may go beyond state court procedural confines. We fail to see any similarity between those cases and the decision in this case.

In summary, it is clear that Curtis elected to raise but a single defense to this action and that was a plea of justification. It is further clear that at the time this defense was filed Curtis well knew of the availability to it of the defense of the First Amendment and decided to ignore it. It thereby elected *not* to defend on constitutional grounds in Georgia but elected to do so in Alabama. The reasons are of no importance. What is important though is that Curtis should be held to this election. It made it with its eyes wide open and with full knowledge that it was at the same time defending on First Amendment grounds in the *Bryant* cases in Alabama.

Curtis attempts to persuade this Court that *Times* did, in fact, radically change the substantive law previously applicable to libel cases. This just isn't true and is recognized as such throughout the decision in *Times*. No attempt will be made here to quote those statements in the decision in detail since it is felt that the following excerpts illustrate our point:

"Respondent relies heavily, as did the Alabama courts, on statements of this Court to the effect that the Constitution does not protect libelous publications. [fol. 1766] Those statements do not foreclose our inquiry here. *None of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials.*" (*Times*, 11 L. Ed. 2d 686 at 699)

"The general proposition that freedom of expression upon public questions is secured by the First Amendment has *long been settled* by our decisions." (11 L. Ed. 2d 700)

"Thus, we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." (11 L. Ed. 2d 701)

"The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government." (11 L. Ed. 2d 703)

"An oft-cited statement of a like rule (prohibiting a [fol. 1767] public official from recovering damages unless he proves actual malice), which has been adopted by a number of state courts, (the court here cites decisions from over a dozen state supreme courts and adds that 'the consensus of scholarly opinion apparently favors the rule that is here adopted.') is found in the Kansas case of *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908)." (11 L. Ed. 2d 706, 707) (Emphasis added)

We think these illustrative quotations should lay to rest the assertion by Curtis that *Times* "radically changed the substantive law previously applicable to libel cases."

We say, therefore, that contrary to the contention urged by Curtis in this section of its brief, the Supreme Court in *Times* did not enunciate a completely new rule of law that can be used by Curtis as an excuse for its deliberate and intentional refusal to raise as a defense to this action the

point that its First Amendment guarantees were involved and would be violated if the action was permitted to proceed.

Curtis can get small consolation from those decisions cited by it in its brief in an attempt to excuse its waiver of fundamental constitutional rights. Each of these decisions dealt with the alleged failure by an ignorant and indigent Negro defendant in a criminal case who was denied his basic constitutional rights. The case Curtis cites most often, *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461 [fol. 1768] (1938), is in this same category. There, the defendant was bound over to await action of the United States Grand Jury and was kept in jail due to his inability to give bail. Later he was indicted; taken to court and there first given notice of the indictment; immediately was arraigned, tried, convicted and sentenced that day to four and one-half years in the penitentiary. The Supreme Court found that:

"Upon arraignment, both pleaded not guilty, said that they had no lawyer, and—in response to an inquiry of the court—stated that they were ready for trial. They were then tried, convicted and sentenced, without assistance of Counsel." (82 L. Ed. 1464)

Continuing, the Supreme Court stated:

"(The Sixth Amendment) embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned Counsel." (82 L. Ed. 1466)

Certainly, Curtis would not put itself in the category of this type of a defendant—not with the experienced and learned counsel employed by it.

Continuing, the Court stated:

"The determination of whether there has been an in-[fol. 1769] telligent waiver of the right to Counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. . . . The *Patton* case (281 U.S. 276) noted approvingly a state court decision pointing out that the humane policy of modern criminal law had altered conditions which had existed in the 'days when the accused could not testify in his own behalf, and was not furnished Counsel,' and which had made it possible to convict a man when he was 'without money, without counsel, without ability to summon witnesses and not permitted to tell his own story.'

"The constitutional right of an accused to be represented by Counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without Counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to Counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate [fol. 1770] ate for that determination to appear upon the record." (82 L. Ed. 1466, 1467)

Certainly, Curtis would not have this Court believe that it was in a position similar to that of these indigent and ignorant defendants in those cases cited by it in its brief. On the contrary, it is abundantly clear from what has already been said that Curtis was represented by highly skilled, competent and able attorneys who were thoroughly cognizant of its right to plead the First Amendment and who went so far as to do this in one instance and refused to do it in the other. Could there be any clearer example of a waiver of a known right? As the majority panel stated,

"the facts more than justify our conclusion that Curtis was fully aware when this suit was instituted, and certainly no later than the beginning of trial, that the constitutional questions it now argues had been for some time, and were still being, vigorously asserted in *Times*." (Dec. P. 13) and, we might add, in the *Bryant* cases.

As the majority concluded:

"For whatever tactical or other reason Curtis sat back and failed to carry the constitutional torch before verdict and judgment, the fact remains that it was charged with knowledge, through its interlocking battery of able and distinguished attorneys, of the issues involved in the *Times* case, and was afforded every reasonable opportunity to have those same issues heard and determined by the trial court in the case at bar. What the Supreme Court would, or might, hold in [fol. 1771] *Times* was not decisive. What was important was that Curtis had to invoke any constitutional claims in an appropriate way, and at an appropriate time. Considering the resources of Curtis, both practical and legal, and the contemporary awareness of constitutional rights pervading even problems of local jurisprudence, Curtis' complete and utter silence amounted to 'an intentional relinquishment or abandonment of a known right or privilege.'" (Dec. P. 15-16)

Even Judge Rives in his dissent recognizes that Curtis must not have intended to raise this issue before verdict and judgment when he commented upon Curtis' failure even to offer the defense under Georgia law (Ga. Code Ann., Section 105-709(6)) which provides that communication concerning the "acts of public men in their public capacity" are deemed privileged under certain conditions. He states:

"Thus, although the Georgia statute which grants a privilege to 'comments upon the acts of public men in their public capacity and with reference thereto' appears as broad, if not broader, than the 'public official'

as contemplated by *New York Times Co.*, the plaintiff recognizes that the Georgia case law results in a narrow application of the privilege and the present plaintiff is not covered." (Dec. P. 44)

[fol. 1772] Of course, what Judge Rives had to say about what the plaintiff Butts and his attorneys recognize about this law is immaterial insofar as the point is concerned. Suffice it to say, had Curtis meant to rely upon the First Amendment and/or Georgia Code Section 105-709(6), which, as Judge Rives says, is even "broader than the 'public official' as contemplated by *New York Times Co.*," both were clearly available to it and, just as clearly, Curtis knew of their existence and availability. It raised *both* defenses in *Bryant*!

We might point out here that the reference by Judge Rives to *Henry v. Collins*, 380 U.S. 356, is of no help because the question of waiver was not raised in that case and, therefore, was not considered by the Supreme Court.

In its brief, Curtis has the temerity to state that "the majority declined to review the evidence which unquestionably demonstrates the lack of actual malice on the part of the Post." (P. 3) Curtis then proceeds to give its own summary of what it says was the evidence in the case. The fact remains, however, that in spite of what Curtis has said, the majority did review the evidence in detail and so stated more than once. For example, the majority held at Page 32:

"The publication of the article by the Post, in the face of several specific appeals that it refrain from doing so, was part and parcel of a general policy of callousness, which recognized from the start that Butts' career would be ruined. The trial judge's appraisal of [fol. 1773] the evidence, *with which we are in complete accord*, was that it was sufficiently strong to justify the jury in concluding that what the Post did was done with reckless disregard of whether the article was false or not.

"The case was fully developed during extensive pre-trials, and in a jury trial lasting two weeks. The record itself comprises 1613 pages. *We have given full consideration to the entire record . . .*"

Again, the majority stated at Page 6:

"As the trial judge saw it: 'The article was clearly defamatory and extremely so . . . The guilt of the defendant was so clearly established by the evidence in the case so as to have left the jury no choice but to find the defendant liable.' *We wholeheartedly agree with that appraisal.*" (Emphasis added)

The above two quotations might well lead one to ask what possible benefit Curtis could hope to get if a rehearing was granted as requested. It is abundantly clear from its decision that, had it ruled precisely on that point, it would have concluded that "actual malice" had been proven beyond a doubt and, therefore, the limitations of *Times* would have no effect. We think the last two quoted portions of the majority's decision substantiates this beyond any doubt.

[fol. 1774]

II.

The Points Urged by Curtis in This Section of Its Brief Are Merely a Repetition of Points Previously Rejected Both by the Trial Court and the Majority Decision in This Court.

Curtis, in Part II of its brief, complains that the punitive damage award, as reduced, violates its rights under the Constitution and could not be cured by remittitur.

Part II of Curtis' brief deals primarily with four points:

1. The punitive damage award, four hundred times the Georgia criminal libel fine, amounts to criminal punishment without the procedural safeguards of due process.

2. No definite standard or guide governed the award.

3. The award cannot stand because it was a result of the jury's passion and prejudice.

4. The remittitur invades Curtis' right to trial by jury under the Seventh Amendment of the Constitution.

This is nothing more than a repetition of Curtis' argument on this point in its previous briefs to this Court and the trial court.

Point one emphasized by Curtis can be disposed of by referring this Court to the decision of *Reynolds v. Pegler*, 123 F.Supp. 36 (D.C.N.Y. 1954), and the New York Criminal Libel Law, N.Y. Unconsol. Laws Art. 126 §1340, §1341, §1937 (McKinney, 1944).

The jury in *Reynolds v. Pegler*, *supra*, awarded \$100,000 punitive and \$1.00 compensatory damages against the author of the article. The Second Circuit, in *Reynolds v. Pegler*, 223 F.2d 429 (2d Cir. 1955) affirmed, holding, at page 434, the amount of punitive damages to be awarded [fol.1775] is peculiarly within the province of the jury:

"It is not our function to calculate what any or all of the defendants should be required to pay by way of punishment . . ."

At this point it is well to note that under §1341 of New York Law, *supra*, criminal libel is punishable as a misdemeanor, and §1937 of New York Law provides one convicted of a misdemeanor may be fined not more than \$500.00.

The United States Supreme Court denied certiorari in the *Reynolds* case, *supra*, in 350 U.S. 846. The award of punitive damages in *Reynolds v. Pegler* was two hundred times the maximum fine which could have been imposed in a criminal prosecution in New York, and one hundred thousand times the amount of compensatory damages awarded by the jury.

The most obvious defect in Curtis' argument becomes apparent when the true purpose of punitive damages is

considered. They were allowable at common law to deter the defendant from any such wrong in the future, and as a proof of the detestation of the jury for the act itself. Clearly, the amount awarded could be many times the maximum fine for a misdemeanor.

Curtis, in its second point, complains that no definite standard or controlling guide was given the jury to govern the award.

The court in *George Knapp & Co.*, 21 Mo. 655, 112 S.W. 474 (1908), was of the opinion that so many considerations enter into the awarding of damages by a jury in a libel case that the courts approach to the question of excessiveness of a verdict with great reluctance. The court added [fol. 1776] that in such a case, the question of damages was peculiarly within the province of the jury and apart from prejudice or corruption the verdict would not be interfered with.

Defendant's contentions relative to due process would all but abolish punitive damages. Such contentions appear to have escaped the notice of counsel and the courts for one hundred years since the passage of the Fourteenth Amendment.

The standard in Georgia, which rests upon the enlightened conscience of the jury, applies alike to an award for pain and suffering. Such rule rests on the fact that by the very nature of the tort it is impossible to set up any other standard to guide the jury.

The third point raised by defendant is that the verdict was the result of passion and prejudice.

It is well settled that the trial court's determination, as to whether a verdict is the result of passion or prejudice, will not be disturbed unless the determination is clearly erroneous. 6 *Moore's Federal Practice* ¶59.05[3], p. 3746 (2d. Ed.).

In *Bradley Mining Company v. Boice*, 194 F. 2d 80 (9th Cir. 1957) cert. den. 343 U.S. 941, it was held that a federal appellate court could consider only whether a verdict was

grossly excessive or monstrous, while the trial judge might set aside the verdict if he thought it was against the weight of evidence. The trial judge is so familiar with the atmosphere of the trial and sensible of imponderables, the appellate court should hesitate to interfere. The reason why a trial court's decision as to whether a verdict is the result [fol. 1777] of passion and prejudice will stand is obvious. The trial judge's familiarity with the atmosphere and personalities of the case allows the judge to give a well-considered determination of whether or not passion or prejudice prevailed.

The fourth point raised by Curtis was that the reduction by Judge Morgan of the punitive damage verdict to \$400,000.00 constituted an invasion of defendant's right to trial by jury on the issue of damages guaranteed by the Seventh Amendment.

Professor Moore disagrees. Moore states that remittitur practice in the federal courts in jury cases has become widespread following Justice Story's decision, sitting on circuit, in *Blunt v. Little*, 3 Fed. Cas. 760 (C.C.D. Mass. 1822). Some have criticized the granting of remittitur in jury cases as violating the Seventh Amendment, however:

"... its use has become so universal in the trial and even in the appellate courts and has had the apparent approval of so many Supreme Court cases, that it cannot be contended that its use is unconstitutional without uprooting of precedent akin to that effected by *Erie v. Tompkins*." 6 *Moore, Federal Practice*, ¶59.05[3], p. 3740 (2d. Ed.).

This Court approved the use of the remittitur in *Greyhound Corporation v. Dewey*, 240 F. 2d. 898 (5th Cir. 1957).

Curtis further makes the point that there is no standard for the amount to be remitted.

In fact most courts have not articulated any definite standard by which to determine the amount of the remittitur. *Moore, supra*, p. 3743. The majority of the remittitur

[fol. 1778] cases fix the amount at a figure the court believes a proper functioning jury should have found. This position gives the defendant the benefit of the full supervisory power of the court. Such a position effects a fair and practicable adjustment. *Moore, supra*, p. 3745.

In conclusion to Part II of Curtis' brief, it here has *raised again* points which have no *mérit* and have previously been argued time and time again. Punitive damages cannot be equated to a penal fine for misdemeanors. Of necessity the jury has no algebraic formula for calculating the amount of punitive damages. Such a determination must be made by the enlightened consciences of impartial jurors. The trial judge's determination of whether the verdict is a result of passion and prejudice should be allowed to stand. It is settled beyond any serious argument that the remittitur practice does not violate rights guaranteed by the Seventh Amendment.

III.

In This Section Curtis Is Again Merely Relying Upon Points Previously Rejected in the Trial Court and by the Majority in This Court, None of Which Are the Basis for Granting a Rehearing Under Rule 25(a) of This Court.

In Section III of its brief in support of its motion for rehearing en banc, Curtis has lumped together some nine claimed procedural errors. All of these deal with various rulings during the trial as to the admissibility of evidence, the propriety of Appellee's argument and the correctness of the court's instructions.

In this shotgun attack, Curtis has completely overlooked [fol. 1779] the basis for a motion for a rehearing en banc. Rule 25(a) of this Circuit's Rules clearly provides that "ordinarily, a hearing or rehearing en banc is not ordered except: (1) when necessary to secure or maintain uniformity or conformity in the decisions of the Court, or (2) when unusually important or novel questions are to be decided."

"En banc courts are the exception, not the rule. They are convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit." *U. S. v. American-Foreign S.S. Co.*, 363 U.S. 685, 4 L. Ed. 2d. 1491, 80 S. Ct. 1336 (1960).

The mere fact that the decision here under review was by a divided court gives no justification for a rehearing. *Shreveport v. Holmes*, 125 U.S. 694. To suggest that a rehearing en banc should be granted because a District Judge participated in the decision does not speak favorably for counsel for Curtis.

There has been no intimation by Curtis with respect to the points here raised that the Court overlooked or misconstrued any controlling authority, that the decision is in anywise contrary to any prior decision of this Court, or that any of these points are unusually important or novel. Rather, Curtis has simply taken the position that the contentions it made initially were sound and should have been sustained. These points were considered very thoroughly and at length by the Court. The entire court should not be burdened with this task merely because of the disappointment of Curtis. Needless to say, Appellee should not [fol. 1780] be faced with any more delay than he has met thus far.

The first point raised deals with the refusal of the court to permit evidence of alleged specific acts of misconduct. This is nothing but a continuing attempt by Curtis to assassinate Appellee's character without any justification. They have reiterated their patently false assertions that Appellee's entire case revolved around his loyalty to the University. In our main brief (pp. 99-108), this point was dealt with extensively. Suffice it to say that Appellee never testified that he had done nothing to hurt the University. The fact that he had made such a statement prior to the trial was elicited by counsel for Curtis for the sole purpose

of trying to lay the groundwork to introduce evidence relating to alleged specific acts of misconduct.

The authorities cited in our main brief show without question that the courts uniformly reject such evidence. The case of *Cox v. Strickland*, 101 Ga. 482 (5), 28 S.E. 655 (1897) clearly held that under Georgia law in a libel suit, the defendant has the right to show the plaintiff's bad character "but cannot in so doing, go into proof of special acts."

The article in question dealt only with the alleged fixing of the Georgia-Alabama football game and not with the private life of either Coach Butts or Coach Bryant. The complaint dealt solely with his reputation in the football coaching profession, which Curtis admitted was good before it published the article which it knew would kill that reputation. Under this state of the evidence and the law, there was clearly no error in rejecting this type of evidence.

Curtis goes on to say that the court erred in refusing to allow it to cross-examine Appellee with respect to certain testimony given by him in his deposition and with respect [fol. 1781] to his refusal to answer certain questions on his deposition. The alleged "false testimony" (relating to whether he knew anyone who went by the name of E. C. Lindsey) was not relevant to any issue in the case and was but another attempt by Curtis to evade the court's ruling that evidence of alleged specific acts was not admissible. (pp. 101-102, Brief of Appellee) The refusal of Appellee to answer certain questions was based on advice of counsel, and subsequently they were answered in detail. No possible harm was suffered by Curtis by this delay, and hence there was no prejudicial error (See pp. 109-112, Brief of Appellee).

Curtis next urges that it was improperly prevented from impeaching witness Carmichael by proof of a 30 year old conviction of a childhood misdemeanor and by proof that he had made mis-statements in applications for licenses to sell beer many years before the trial.

The rule is well settled that a federal trial judge has the discretion of admitting or rejecting proof of an ancient conviction. See cases cited at pp. 113-115 of Appellee's main brief and particularly *Goddard v. U. S.*, 131 F. 2d. 220 (5th Cir., 1942), a case arising in Georgia. Although Curtis relies on *Woodward v. State*, 197 Ga. 60, 28 S.E. 2d. 480 (1943), this case merely held that it was not error for the trial judge to admit a 23 year old felony connection; the case is not authority for the proposition that a 30 year old misdemeanor conviction must be admitted. Whether such a conviction is admissible lies entirely within the discretion of the trial court.

With respect to Curtis' claim that Carmichael had a "propensity to give false statements," the authorities are decidedly against the admissibility of this type of evidence. As this Court very clearly held in *Roberson v. U. S.*, 249 [fol. 1782] F. 2d. 737 (5th Cir., 1957) an attempt to impeach a witness cannot be made by showing wrongful conduct or even the commission of a crime for which there has been no conviction. The general rule is that "a witness cannot be impeached by evidence showing particular instances in which he has been untruthful." 98 C.J.S. Witnesses §512, p. 417. See pp. 115-119 Appellee's main brief.

The next claimed error relates to the refusal of the court to permit witness Burnett to testify as to conversations he had with the telephone operator and Milton Flack (who was not called by Curtis as a witness) to corroborate his assertion that there was in fact a telephone conversation between the two coaches. As the majority of this Court pointed out (and there was no dissent on this point), "the full import of most, if not all, of that evidence got before the jury." Indeed, there was never any contention that there was no telephone conversation. Butts didn't deny it. The only thing in dispute was whether the contents of that conversation were correctly reported by Burnett, and no amount of self-serving, extrajudicial assertions by Burnett would be admissible to corroborate his patently fictitious story.

Error, to be reversible, must be harmful. As held by this Court in *State Farm Mutual Auto Insurance Co. v. Bourne*, 220 F. 2d. 921, 923-924 (5th Cir., 1955):

"Appellate courts do not sit to review claims of procedural errors where it is plain, as here, that no substantial prejudice could possibly have resulted and the questions, therefore, are mere abstractions."

The next three points concern the court's instructions regarding the construction to be placed upon Appellee's testimony, the credibility of witnesses and the presumption [fol. 1783] that Appellee had a good reputation. These points are of such little present consequence and have been covered so fully in Appellee's main brief (pp. 147-161), that further comment is unwarranted.

Contrary to Curtis' argument next urged, the trial court correctly charged the jury that the article was libelous per se, that is, as a matter of law. In its answer, Curtis admitted that Butts had a good reputation in his chosen profession. At the trial, Curtis successfully urged that it had filed a valid "plea of justification" which, under Georgia law, is the admission of a prima facie case in favor of the plaintiff. Thus, the Post made a solemn admission *in judicio* that Butts was a member of the football coaching profession, that his previously good reputation had been injured, that the article was written with malice and that it was false. Under these admissions, as well as the undisputed evidence, the court, following the rule laid down in *Walker v. Sheenan*, 80 Ga. App. 606, 54 S.E. 2d. 628 (1949) to the effect that statements tending to injure one in his trade are libelous per se, correctly charged that the article was libelous as a matter of law.

Curtis concludes its many-faceted attack by claiming that counsel for Appellee were allowed to make improper arguments to the jury. If objection had been made, the trial court would have been in a position to stop any improper argument and to take such corrective measures as were

necessary, including instructing the jury to disregard it and rebuking counsel. None of Curtis' numerous attorneys participating in the trial thought that this was needed, hence they sat silently by. Assuming purely for the purpose of this brief that the argument was improper (although we agree with the majority which held to the contrary), the matter is aptly put to rest by this Court's holding that "they did not consider the arguments objectionable at the time they were delivered, but made their claim as an after-thought." (P. 20)

[fol. 1784]

Conclusion

It is clear that Curtis Publishing Company has shown no basis for this Court to grant its request for a rehearing en banc. The decision of the majority should be allowed to stand.

Respectfully submitted,

William H. Schroder, Allen E. Lockerman, Robert
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[fol. 1785] CERTIFICATE OF SERVICE (omitted in printing).

[fol. 1786]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21491

CURTIS PUBLISHING COMPANY, Appellant-Appellee,

versus

WALLACE BUTTS, Appellee-Appellant.

(AND REVERSE TITLE)

Appeals from the United States District Court for the
Northern District of Georgia.

ON PETITION FOR REHEARING

Before Rives and Brown, Circuit Judges, and Spears,
District Judge.

OPINION—October 1, 1965

Per Curiam: As Curtis' petition for rehearing asserts that the waiver found by us is based on "alleged facts, most of which are outside the record", and upon "unsub-
[fol. 1787] ported statements in Butts' brief, which for the most part are not true", we deem additional comment appropriate.

The burden of Curtis' brief, elaborated in the petition for rehearing, is that *Times* came like a bolt out of the blue, and no one either knew of, or could anticipate, that a state-created libel damage action was subject to or could be controlled by First Amendment freedom of speech.

constitutional limitations. Therefore, the argument runs, until *Times* there was no reason to assert the constitutional claim, and consequently it should not be held to the usual appellate consequence of failing properly to preserve the point.

Obviously this Court is not required to accept the mere assertions of Curtis. This Court has the duty of determining whether this contention of Curtis was well founded. While this partakes of factual evaluation in a sense, the question of waiver is a law problem—i.e., whether skilled counsel would reasonably think the contention to be plausible. Since Curtis did not seek to raise the constitutional issues before verdict and judgment, it was entirely proper to look to the sources discussed in our original opinion in order to ascertain the pertinent facts. Until the filing by Curtis of its petition for rehearing, the statements in Butts' brief, referred to by Curtis, had not really been disputed. And now, after having given full consideration to the affidavits and to all other matters presently submitted by Curtis, we are still of the firm opinion that when all of the acts and conduct of Curtis' [fol. 1788] attorneys are tested in the light of reason, Curtis cannot sustain the proposition that its counsel were ignorant of a constitutional claim so as to be totally excused for the complete absence of any timely assertion of it.

To its petition for rehearing, Curtis attaches affidavits made by Philip H. Strubing, whose Philadelphia, Pennsylvania law firm of Pepper, Hamilton & Scheetz, is general counsel for Curtis; by T. Eric Embry, whose Birmingham, Alabama law firm represented the New York Times Company in the case brought against it by Sullivan (*Times* case), and also represented Curtis in the related libel cases brought against it in the United States District

Court by Coach Paul Bryant;¹ and by Welborn B. Cody, who was lead trial counsel for Curtis in the *Butts* case. In general, the affidavits assert that Mr. Embry and his partner, Roderick Beddow, Jr., attended the trial of this *Butts* case as spectators only, were not consulted concerning trial strategy, and did not advise Mr. Cody concerning the constitutional questions they had raised in *Times*. Mr. Cody stated that "he was not aware of the constitutional issues being urged in (the *Times*) case."

There is no dispute that the lawyers who sat together at the Curtis counsel table during the *Butts* trial were representing Curtis either in this case or in the related Bryant libel suits pending in Alabama, so presumably they were all on Curtis' payroll. Unusual as it would be for them not to consult with one another concerning strategy and tactics during the two-week trial, we accept the statement [fol. 1789] that neither Mr. Embry nor Mr. Beddow informed Mr. Cody of the constitutional questions being raised in the *Times* case.

• But what about Mr. Strubing? In his affidavit he stated that he participated actively in the preparation of the *Butts* case for trial, and that he also worked actively with Mr. Embry in the preparation of the related *Bryant* cases. He is also on the brief in our case and participated in the arguments.

Butts' response to the petition for rehearing refers us to the records of this Court, of which, of course, we may also take judicial notice. In Cause No. 21,152, *The Curtis Publishing Company v. Honorable H. H. Grooms, United States District Judge for the Northern District of Alabama*, Curtis sought a writ of mandamus to compel Judge Grooms to vacate his orders denying Curtis' motion for change of venue. That record reflects that on February 26, 1963 (one month before the *Butts* suit was filed) Mr. Strubing's law

¹ Civil Actions Nos. 63-2-W and 63-166, brought in the Western and Southern Divisions respectively, of the Northern District of Alabama.

firm, together with the firm of which Mr. Embry and Mr. Beddow are members, signed and filed in the Alabama District Court a motion to dismiss the related libel action instituted by Bryant, on the grounds, among others, that:

"To subject this defendant to liability in the circumstances complained of would abridge the freedom of speech and of press in violation of the First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment to the Constitution of the United States . . . [fol. 1790] "To subject this defendant to liability in the circumstances complained of would be repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States . . ."

In a later suit filed against Curtis by Bryant the same two law firms made identical contentions in a motion to dismiss signed and filed by each of them in the District Court on April 30, 1963, still more than three months before the trial of the *Butts* case.

If the First and Fourteenth Amendments were thought by Mr. Strubing and his law firm to be valid grounds for dismissal of the related *Bryant* cases in Alabama, why did they not assert them in the *Butts* case? By his own statement Mr. Strubing was an *active* participant in all three cases, so he certainly should have known what the rights of Curtis were. Although he now says that he was not aware of the constitutional defenses articulated by *Times* until that case was decided by the Supreme Court some six months after the trial of the *Butts* case, neither he nor his local counsel (Mr. Embry) considered a final decision in *Times*—or for that matter any other case—a necessary prelude to raising in the related *Bryant* cases, the constitutional claim previously asserted by Mr. Embry in *Times*.²

² That these constitutional claims were well preserved by these counsel in *Times* without the learning which was to come several years later through the words of the *Times* opinion is recognized

And for good reason, at least ever since June 1962 when [fol. 1791] those who wished could see the handwriting on the wall, certainly as the moving finger followed the voice of Mr. Justice Black's celebrated "First Amendment 'Absolutes'; A Public Interview".³

by the Court itself: "The (Alabama trial) judge rejected petitioner's contention that his rulings abridged the freedoms of speech and of the press that are guaranteed by the First and Fourteenth Amendments." 376 U.S. 254, 263.

The Alabama Supreme Court also recognized the assertion of these constitutional claims for it "rejected petitioner's constitutional contentions with the brief statements that "the First Amendment of the U.S. Constitution does not protect libelous publications
• • • 14 So.2d at 40." 376 U.S. 254, 264.

³ Justice Black and First Amendment "Absolutes"; A Public Interview, Edmond Cahn and Mr. Justice Hugo L. Black, 37 NYU Law Review 549 (June 1962). The background of the interview was the Justice's lecture entitled "the Bill of Rights", delivered at the New York University School of Law, February 17, 1960, published at 35 NYU Law Review 865 (1960). See, e.g.:

"CAHN: Do you make an exception in freedom of speech and press for the law of defamation? That is, are you willing to allow people to sue for damages when they are subjected to libel or slander?"

"JUSTICE BLACK: My view of the First Amendment • • • is that it said Congress should pass none of these kinds of laws. • • • I have no doubt myself that the provision • • • intended that there should be no libel or defamation law in the United States under the United States Government, just absolutely none so far as I am concerned. • • •" (557)

"• • •"

"My belief is that the First Amendment was made applicable to the states by the Fourteenth. I do not hesitate, so far as my own view is concerned, as to what should be and what I hope will sometime be the constitutional doctrine that just as it was not intended to authorize damage suits for mere words as distinguished from conduct as far as the Federal Government is concerned, the same rule should apply to the states.

"• • •"

"I am for the First Amendment from the first word to the last. I believe it means what it says, and it says to me, • • • Government shall not attempt to control the ideas a man has. • • • Government shall not abridge freedom of

[fol. 1792] Granted that the extra-judicial statements of a single Justice do not an opinion make,⁴ the Court itself in *Times* treats this newly announced rule as a natural development of the constitutional propositions long recognized by its extensive writings on First Amendment freedom of speech rights.⁵ Thus, it emphasized that the "general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions." 376 U.S. 254, 269. Announcing its rule, it referred to the "oft-cited statement of a like rule . . . adopted by a number of state courts . . . found in the Kansas case of *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908)"—a decision then nearly half a century old.

Whatever may have been the reasons for invoking the First Amendment claim in the Alabama suits⁶ while remaining silent in Georgia, Curtis cannot sustain the proposition that it was unaware that a defendant in a libel action might assert the constitutional claim as a defense. Counsel for Butts make a persuasive suggestion that Curtis elected to defend this case on its plea of justification, rather than raise the jurisdictional, constitutional and other affirmative defenses⁷ it had raised in the Alabama *Bryant* cases,

the press or speech. It shall let anyone talk in this country.'
 . . . Let them talk! In the American way, we will answer them." (563)

⁴ They were shortly to be announced *ex cathedra* in his concurring opinion in *Times*, 376 U.S. 254, 293, joined by Mr. Justice Douglas and substantially echoed by Mr. Justice Goldberg (with Justice Douglas), 376 U.S. 254, 297.

⁵ See the extended annotations, *The Supreme Court and the Right of Free Speech and Press*, 11 L.Ed. 2d 1116-1175; 2 L.Ed. 2d 1706; 93 L.Ed. 1151.

⁶ These would include the conditional privilege recognized by §105-709(6) of the Georgia Code concerning published statements relating to the "acts of public men in their public capacity". See Note 20, 376 U.S. 254 at 280.

[fol. 1793] in order to get the right to open and close the arguments.

Nor, as suggested in Judge Rives' dissenting opinion on denial of rehearing, do we consider that our action is at all inconsistent with the principle of law expressed for the Court by Judge Wisdom in *Commissioner of Internal Revenue v. Chase Manhattan Bank*, 5 Cir., 1958, 259 F.2d 231, 238, cert. denied, 359 U.S. 913.⁷

⁷ Actually, in this tax case the theory later developed for the first time in this court had been raised in the bank's petition filed in the lower court and agreed upon by both parties at the trial. The Court, in deciding to consider the development of the theory, stated that the "tax liability as to the testamentary trust depends on whether Daniel's will put Marie to an election. *The question is in the case.* A just determination of the appeal requires us to decide it." (Emphasis supplied). This case involved the gift tax liability under three trusts created by the decedent, "Daniel", one of which was a testamentary trust of his residuary estate from which his wife, Marie, was to receive the income for life, the remainder to be divided among Daniel's descendants. In the Tax Court, the bank's petition stated that "the estate was still under administration and that 'no determination has yet been made as to whether or not the said Marie Elizabeth Moran has elected to take under the will' . . . that Marie's motive 'in not taking against the will was to benefit herself' ". At the trial the Commissioner and the bank agreed to assume that Daniel's will put Marie to an election and that Marie's receipt of income from the trust was sufficient to show that she had elected to take under the will. They differed only as to whether the effect of the election was that she had made a taxable gift. The Tax Court held that Daniel's will put Marie to an election and that Marie's "acquiescence" in the testamentary trust constituted a taxable gift. On appeal, for the first time in the case, the defendant made the assertion that Daniel's will did not purport to dispose of Marie's share and therefore she was not put to an election, thereby denying that Marie transferred her share of the community estate to the trust. In answer to the Commissioner's objection to the bank's new argument that Marie was not put to an election, and its contention that the taxpayer is not at liberty to urge as a ground for reversal a point not raised in the court below, the court states that "indeed, . . . the taxpayer invited error . . . worse, the invitation was accepted. But an appellant has no vested right in an opponent's error of law in the lower court—especially when the protesting appellant is the Commissioner of Internal Revenue

[fol. 1794] In that case the legal theories developed in this Court for the first time could be fairly disposed of on the record, and the opposing party was not prejudiced by the use of other theories.* However, here Curtis seeks a reversal so that a new record based on different theories may be made at another trial. The wholesome desire "to secure the just . . . determination of every action", neither [fol. 1795] dispenses with the rules of procedure, nor forecloses the applicability of the doctrine of waiver when all of the elements which constitute that doctrine are present, as in the present case.

. . . (who) owes a duty to all taxpayers . . . to see that the tax law is applied justly. . . . Federal procedure is moving away from what Pound calls 'the sporting theory of justice', Wigmore the 'instinct of giving the game fair play', and Arthur Vanderbilt the 'theory of procedure as a contest between two legal gladiators'. We are a court 'to secure the just . . . determination of every action'. Rule 1, Federal Rules of Civil Procedure, 28 U.S.C.A. Daniel's will is in the record and speaks for itself. '(W)here, as here, the case below was tried, not upon any misapprehension of the facts, but upon a misapprehension of the effects of those facts in law, appellant may not be prevented from pressing here for the application, to the proven facts, of the correct principles of law.' . . . 'We see no reason why we should make what we think would be an erroneous decision, because the applicable law was not insisted upon by one of the parties.'"

See also *Jack Ammann Photogrammetric Engineers, Inc. v. Commissioner of Internal Revenue* (5th Cir. 1965) 341 F. 2d 466, a tax case citing *Commissioner of Internal Revenue v. Chase Manhattan Bank*, in determining that since legal theories were there being urged "that can be fairly disposed of on the record before us. We do not consider that we should refuse to consider them merely because they were not urged in the Tax Court."

* See *Glavic v. Beechie* (5th Cir. 1964), 340 F. 2d 91. The majority refused to consider a question not presented for determination in the District Court. Judge Wisdom in his concurring opinion stated, in opposing this decision, that he "would allow either party on appeal to advance a new theory or to change his theory of the case—if: (1) all the relevant evidence is before the court, (2) the opposing party has had adequate time to brief the point, and (3) the opposing party is not prejudic(ed) by not having introduced evidence below that would have militated against the validity or effect of the new theory."

As to all other contentions in the petition for rehearing and supporting brief, we adhere without further comment to the holdings in our original opinion. Finding no error, see Rule 25(a) of this Court, the petition for rehearing is denied.

Petition Denied.

RIVES, Circuit Judge, Dissenting:

The majority undertakes to bolster its holding "that Curtis has clearly waived any right it might have had to challenge the verdict and judgment on any of the constitutional grounds asserted in *Times*."¹

I.

As suggested in my earlier dissent,² that is not true as to the holding in *Times* that a state law of civil libel which sustains the imposition of extremely large awards of damages in libel actions may constitute a prior restraint on freedom of expression forbidden by the First and Fourteenth Amendments. *New York Times Co. v. Sullivan*, 1964, 376 U.S. 254, 277, 278.

The enormous amount of the verdict in the present case could not have been anticipated. Curtis raised the point [fol. 1796] seasonably as a ground for its first motion for new trial.³

¹ Slip Opinion, pp. 17 and 18.

² Slip Opinion, pp. 46, 47, 52 and 53.

³ "That portion of the jury's verdict awarding the plaintiff \$3,000,000 punitive damages, violates and abridges and cannot be sustained without violating and abridging the right of freedom of speech and of the press guaranteed by the First and Fourteenth Amendments of the United States Constitution because:

".....
"(e) The amount of punitive damages, in the circumstances of this case, was so excessive as to violate and abridge through excessiveness alone, the guarantees of free speech and press."
(Record, pp. 46, 47.)

In ruling on that motion the district court recognized that: "As far as this Court can ascertain, the largest award ever sustained for punitive damages by the Appellate Courts was an award of \$175,000.00 in the case of *Reynolds v. Pegler*, D.C., 123 F.Supp. 36; 2 Cir., 223 F.2d 429." 225 F.Supp. 916, at 919. Nonetheless, after the plaintiff filed his remittitur, the district court entered judgment against Curtis for \$400,000 punitive damages plus \$60,000 general damages, or a total of \$460,000. Since that time, Curtis has lost no opportunity to insist that the \$460,000 award, if sustained, is so large as to constitute a prior restraint upon freedom of the press within the rule announced in the *Times* decision. On that issue, there is, I submit, no debatable question of waiver. For reasons expressed in my prior dissent,⁴ I would rule with Curtis on that issue.

As to the punitive damage award, the section of the Georgia Code quoted in my earlier dissent⁵ and the oral [fol. 1797] charge to the jury,⁶ make clear that the very purpose of punitive damages is to act as a deterrent to future conduct, which, in libel cases, means a prior restraint on freedom of expression. When that deterrent or restraint assumes proportions of the jury's verdict, \$3,000,000, or even of the award made by the district court, \$400,000, I submit that it is forbidden by the First and Fourteenth Amendments.⁷

The part of the *Times* opinion relating to prior restraints on freedom of expression was certainly not "new law."

⁴ Slip Opinion, pp. 51, 52 and 53.

⁵ Section 105-2002, Georgia Code Annotated.

⁶ "The purpose of punitive damages is to deter the defendant from a repetition of the offense and is a warning to others not to commit a like offense. It is intended to protect the community and has an expression of ethical indignation, although the plaintiff receives the award."

⁷ See *Bantam Books, Inc. v. Sullivan*, 1963, 372 U.S. 58, 70, cited in *Times* (376 U.S. at 278).

Nor was that part of the opinion limited to public officials. Clearly, I submit, whether Butts was a public official or not, the enormous award of damages must be set aside.

II.

The specific holding in *Times*, which had not theretofore been generally recognized, was that a State cannot under the First and Fourteenth Amendments award damages to a public official for defamatory falsehood relating to his official conduct unless he proves "actual malice"—that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false. It was that principle to which I referred in my earlier dissent,⁸ when I said "it was not even enunciated by the [fol. 1798] counsel who petitioned for certiorari in the *New York Times Co.* decision."⁹ Now on petition for rehearing, counsel makes affidavit that: "The requirement of the *New York Times* case that general damages could not be awarded without the necessity of proof of actual malice on the part of the defendant was not specifically presented in the Alabama courts nor in the petition for certiorari to the United States Supreme Court."

In order properly to object¹⁰ to the district court's instructions allowing recovery of general damages without proof of malice, and recovery of punitive damages on a definition of malice at variance with that prescribed in *Times*, counsel must have anticipated that specific holding of the *Times* decision.

Judge Morgan, the District Judge in the present case, recognized, at least impliedly, that Curtis had not waived

⁸ Slip Opinion, p. 42.

⁹ An opinion which I had reached from an examination of the petition and briefs on certiorari.

¹⁰ "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Rule 51, Fed.R.Civ.P.

that constitutional right by its failure to insist upon it at the trial, when, in denying the motion for new trial under Rule 60(b), Fed.R.Civ.P., he considered and ruled on the defense on its merits. *Butts v. Curtis Publishing Co.*, N.D. Ga. 1964, 242 F.Supp. 390.

Based largely on facts dehors the present record, the majority held that Curtis' trial counsel had knowingly and intentionally waived the constitutional protections afforded by the *Times* case, by failing to raise them at the trial. In response to that holding, three of Curtis' attorneys have filed with this Court their sworn affidavits.¹¹ Now the majority goes still further beyond the present record and considers another case shown by the records of this Court but of which Judge Morgan could not have taken judicial notice when he considered and ruled on Curtis' section 60(b) motion. With deference, I submit that it is the function of this Court simply to review the ruling of the district court on the record before that court.

If, however, we are to resort to evidence outside the record and to bolster our judicial notice from records in other cases, those extraneous matters do not impugn the integrity and veracity of Curtis' trial counsel. It seems clear to me that, at the time of trial, counsel had no notice of the specific holding thereafter made in *Times*. It is impossible for me to believe that, if counsel had any such notice, they would have knowingly and intentionally waived the specific constitutional protection afforded by the *Times* case "in order to get the right to open and close the arguments," as suggested in the majority opinion.

It is too much to hold counsel to the duty of anticipating the specific holding of *Times*, because of general assertions of First Amendment defenses in other cases, or even because of Mr. Justice Black's view that the First Amendment "... intended there should be no libel or defama-

¹¹ Ethically permissible "when essential to the ends of justice." A.B.A. Canons of Prof. Ethics No. 91.

tion of law in the United States under the United States [fol. 1800] Government, just absolutely none so far as I am concerned"¹² The majority paints with such a broad brush as to require the assertion of a First Amendment defense in *every* libel or defamation case hereafter litigated.

With deference, I submit that it is the outworn sporting theory of justice¹³ which leads the majority to convert this appeal into an unseemly trial of Curtis' lawyers. The function of this Court is not to decide a contest, but to administer justice. Curtis, ~~not~~ its lawyers, stands mulcted in damages to the extent of \$460,000 as the result of a trial conducted on a fundamentally and constitutionally deficient theory of law.

The resulting damage extends far beyond the monetary loss to Curtis. This Court's refusal to consider and decide whether constitutional standards were observed in adjudging Curtis liable is a grave reflection upon the administration of justice itself. Permitting such a libel judgment to stand will cause " . . . the pall of fear and timidity [to be] imposed upon those who would give voice to public criticism in an atmosphere in which the First Amendment freedoms cannot survive."¹⁴

[fol. 1801] A just determination requires this Court to consider and decide this appeal on its merits.¹⁵ The altered

¹² Quoted in footnote 3 to the majority opinion on rehearing.

¹³ "Federal procedure is moving away from what Pound calls 'the sporting theory of justice,' Wigmore the 'instinct of giving the game fair play,' and Arthur Vanderbilt the theory of procedure as 'a contest between two legal gladiators'. We are a Court 'to secure the just . . . determination of every action'. Rule 1, Federal Rules of Civil Procedure, 28 U.S.C.A." *Commissioner of Int. Rev. v. Chase Manhattan Bank*, 5 Cir. 1958, 259 F.2d 231, 238.

¹⁴ *New York Times Co. v. Sullivan*, 1964, 376 U.S. 254, 278.

¹⁵ *Hormel v. Helvering*, 1941, 312 U.S. 552, 556, 557.

situation created by the intervening decision of the Supreme Court makes that a compelling duty.¹⁶

I, therefore, respectfully dissent.

[fol. 1802] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 1803]

SUPREME COURT OF THE UNITED STATES

No. 37—October Term, 1966

CURTIS PUBLISHING COMPANY, Petitioner,

v.

WALLACE BUTTS.

ORDER ALLOWING CERTIORARI—October 10, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and one and one half hours are allotted for oral argument. The case is set for oral argument immediately following No. 150.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

¹⁶ The Peggy, 1801, 5 U.S. (1 Cranch) 103, 110; Connor v. New York Times Co., 5 Cir. 1962, 310 F.2d 133, 135, and cases there cited.